80-571

No. _____

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MISSOURI,
Petitioner,

v.

WILLIAM SCOTT SOURS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter?

2. Whether the Missouri Supreme Court is bound by *Brintley* v. *Michigan,* ____ U.S. ____, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc,* (August 18, 1980), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan,* ____ U.S. ____, 100 S.Ct. 418, 62 L.ED.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.593, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980),

rehearing en banc, (August 18, 1980), conflicts with this Court's decision rendered in *Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, ____ L.Ed.2d ____ (1980)?

5. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State, supra,* is in accordance with this Court's order of May 27, 1980, vacating judgment and remanding the case to the Missouri Supreme Court for further consideration in light of *Whalen* v. *United States, supra?*

PARTIES

In the Missouri Supreme Court, the parties were: William Scott Sours, appellant, and the State of Missouri, respondent.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MISSOURI,
Petitioner,

v.

WILLIAM SCOTT SOURS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

PETITION FOR CERTIORARI

Petitioner, State of Missouri, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri in this case.

OPINIONS BELOW

The most recent opinion of the Missouri Supreme Court, as yet unreported, is styled and numbered as follows: William Scott Sours, appellant[1] v. State of Missouri, respondent,[2] No. 61458, in the Supreme Court of Missouri, En Banc, August 18, 1980. A copy of the opinion is reprinted as Appendix A.

[1]Hereinafter referred to as: Respondent.
[2]Hereinafter referred to as: Petitioner.

The original opinion of the Supreme Court of Missouri, on which this Court issued a writ of certiorari on May 27, 1980, vacated the judgment and remanded the case back to the Missouri Supreme Court for further consideration, is styled and reported as follows: William Scott Sours, appellant v. State of Missouri, respondent, 593 S.W.2d 208 (Mo. banc 1980). A copy of the original opinion is reprinted as Appendix B.

JURISDICTIONAL STATEMENT

Judgment was originally entered in this cause by the Supreme Court of Missouri on January 15, 1980. On February 11, 1980, the Supreme Court overruled petitioner's motion to stay mandate and its motion for rehearing.

Thereafter, on May 27, 1980, this Court granted the petition of the State of Missouri for a writ of certiorari, vacated judgment and remanded the case to the Missouri Supreme Court for further consideration in light of *Whalen* v. *United States,* 445 U.S. ____ (1980). Subsequently, on August 18, 1980, judgment was again entered in this cause by the Supreme Court of Missouri.

The present petition is filed within sixty (60) days after the entry of judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

> shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 560.120, RSMo 1969, § 560.135, RSMo Supp. 1975, and § 559.225, RSMo Supp. 1976 are set forth in Appendix C. Sections 750.227(b) and 750.529, M.C.L.A. are set forth in Appendix D.

STATEMENT OF THE CASE

This petition is brought as a result of the Missouri Supreme Court's opinion holding that convictions for both robbery first degree and armed criminal action violate the Fifth Amendment to the United States Constitution. The history of this case is as follows:

After pleading guilty to charges of first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976, respondent was sentenced to five (5) years imprisonment on the charge of first degree robbery and three (3) years imprisonment on the charge of armed criminal action, said sentences to run consecutively.

Although respondent recognized that he could be convicted of both first degree robbery and armed criminal action, based on the long standing case law in existence in Missouri, *State* v. *Valentine,* 584 S.W.2d 92 (Mo. banc 1979); *State* v. *Woods,* 574 S.W.2d 942 (Mo.App., St.L.D. 1978); and *State* v. *Treadway,* 558 S.W.2d 646 (Mo. banc 1977), *cert. denied,* 439 U.S. 838 (1978), he alleged on appeal that a different offense from robbery in the first degree was involved, *i.e.,* robbery in the first degree by means of a dangerous and deadly weapon. Respondent argued that

robbery in the first degree (not with a dangerous and deadly weapon) was a lesser included offense of robbery in the first degree by means of a dangerous and deadly weapon, in that the additional element needed to prove the latter was the use of a "dangerous and deadly weapon."

The Missouri Supreme Court specifically rejected this argument in its original decision (on which certiorari was granted by this Court), stating that, although the element of fear required under § 560.120, RSMo 1969, was produced by a dangerous and deadly weapon, the use of a dangerous and deadly weapon is not an element of robbery, in the first degree, and therefore is mere surplusage. *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980). Nevertheless, the court went on to say that, if its prior holding in *Treadway* was valid, to-wit: that robbery in the first degree is not included in armed criminal action, appellant's motion for post-conviction relief cannot be sustained. *Id.* The court also held that convictions for both robbery first degree and armed criminal action placed a defendant twice in jeopardy by multiplying the punishment for one offense and, as such, violated the double jeopardy clause of the Fifth Amendment to the United States Constitution. From that decision, petitioner sought this Court's review by way of certiorari.

On May 27, 1980, this Court granted Missouri's petition for a writ of certiorari, vacated judgment, and remanded the case to the Supreme Court of Missouri for further consideration in light of *Whalen* v. *United States,* 445 U.S. ____ (1980).

On July 11, 1980, after further briefing, the Missouri Supreme Court heard oral argument pursuant to this Court's order of May 27, 1980. Thereafter, on August 18, 1980, the Missouri Supreme Court rendered its second decision in this case (from which petitioner presently seeks

certiorari), making two specific holdings. It first held that:

> [W]e find that the general assembly has in clear and unequivocal terms expressed in section 559. 225, RSMo Supp. 1976, its intent to authorize conviction and punishment for armed criminal action and for the underlying felony. In arriving at this conclusion, we apply every test and standard available to us under Missouri law.
>
> * * *
>
> . . . The unique wording of the armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue.

Sours v. *State,* No. 61458 (Mo. banc August 18, 1980), slip opinion at 10, 17-18.

The Missouri Supreme Court addressed the Fifth Amendment issue as follows:

> There is little that we can add to the analysis given the constitutional question in Sours v. State, 593 S.W.2d 208, 211-14, 218-21 (Mo. banc 1980), and we would incorporate that analysis by reference into our opinion today, and reinstate the opinion originally published.
>
> * * *
>
> . . . We must conclude, for the reasons set forth in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), that the proof of the underlying felony—robbery first degree—does not require proof of a fact not also required to prove armed criminal action, or in other words, that proof of armed criminal action necessarily proves every fact required to establish the underlying felony. Consequently, the two offenses are the 'same offense' for double jeopardy purposes, *Illinois* v. *Vitale,* ____ U.S. at ____, 48 U.S.L.W. at 4744; Whalen [v. United

> States], ____ U.S. at ____, 100 S.Ct. at 439; Harris [v. Oklahoma], 433 U.S. at 682; Brown [v. Ohio], 432 U.S. at 167, and the [federal] double jeopardy clause prohibits the state from punishing appellant for both offenses. We believe that, because the double jeopardy clause prohibits punishing a person twice for the same offense, 'the prosecution may not do in one trial what it is prohibited from doing in two trials.' Elmore v. State, 382 N.E.2d 893, 894-895 (Ind. 1978).
>
> • • •
>
> After thorough examination of the opinions in Whalen v. United States [citation omitted], we have concluded that our original opinion and judgment in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), was correct and should be reinstated as supplemented by our opinion today.

Sours, supra, slip opinion at 18, 21-22, 23.

It is from this most recent decision of the Missouri Supreme Court that petitioner seeks this Court's review.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue because the Missouri Supreme Court's holding in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc,* (August 18, 1980), conflicts with recent decisions of this Court.[1]

On May 27, 1980, this Court vacated the Missouri Supreme Court's judgment in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980) (hereinafter referred to as *Sours* I), and remanded the case back for further consideration in light of *Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The Missouri Supreme Court responded to this Court's directive by rendering an opinion in *Sours* v. *State,* No. 61458 (August 18, 1980) (hereinafter referred to as *Sours* II), wherein the Missouri Supreme Court, after determining unequivocally that the Missouri legislature clearly intended that punishment be imposed for both armed criminal action and its underlying felony, incorporated by reference its analysis on the Fifth Amendment issue made in *Sours* I. See, *Sours* II, *slip opinion* at 18.

Although the Missouri Supreme Court was presented with the argument that the combined wisdom of both *Whalen* v. *United States, supra,* and *Brintley* v. *Michigan, supra,* expressed this Court's definitive determination that a defendant can be convicted in one proceeding of two crimes even where the proof required to establish a violation of the first is necessarily required to prove the second, if the legislature so intends, it nevertheless opined as follows:

---

[1]The Missouri Supreme Court's most recent holding in the *Sours* case is identical to its original holding made prior to this Court's granting of the State's petition for a Writ of certiorari.

> The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal constitution. The Court expressly declined to rule on this issue in *Simpson* v. *United States,* [citation omitted] C.F. *Whalen* v. *United States* [citation omitted]. Each time a double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did not intend to separately punish the two offenses involved. *Whalen* v. *United States,* [citation omitted]; *Simpson* v. *United States,* [citation omitted], *Iannelli* v. *United States* [citation omitted]. See *Jeffers* v. *United States* [citation omitted]. No United States Supreme Court opinion has considered a statute that contained wording similar to, or identical to, that found in Missouri's Armed Criminal Statute.

Sours II, *slip opinion* at 2.

In discussing *Whalen* v. *United States, supra,* the Missouri Supreme Court stated:

> The Court expressly reserved the question whether, had Congress clearly imposed multiple punishments for the same offense, the imposition would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation from the constitutional question. . . . Accordingly, since the Court did not reject the petitioner's statutory claim,

> it did not reach the constitutional issue presented. [footnote omitted]

Sours II, *slip opinion* at 3.

Before reasserting its position taken in *Sours* I, the Missouri Supreme Court determined that, without question, the Missouri General Assembly intended that punishment be imposed for both armed criminal action and its underlying felony. That court went on to say that neither case law nor legislative enactment conflicted with the Missouri General Assembly's unequivocal intent, which appears on the face of the statute (See Appendix C), that punishment be imposed for both crimes. *Sours* II, *slip opinion* at 8-18. The Missouri Supreme Court concluded its legislative intent analysis with the specter of this Court quite apparent: "The unique wording of the armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue." *Sours* II, *slip opinion* 17-18 [footnote omitted].

With the "bullet" firmly between their teeth, the Missouri Supreme Court proceeded to readopt their original opinion rendered in *Sours* I, but not without, again, the specter of the United States Supreme Court reappearing:

> If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen* was intended to lead this Court [sic] to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy pro-

> tection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause. It would grant to the state legislature the power to define meaning of 'same offense' as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court [sic] to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it.

Sours II, *slip opinion* at 22-23.

Petitioner requests that this Court reassert its definitive decisions on this federal constitutional issue for the benefit of the Missouri Supreme Court. It is clear that the Missouri Supreme Court has chosen to disregard recent decisions of this Court which have attempted to elucidate the law of double jeopardy herein raised. In *Brintley* v. *Michigan, supra,* the appellant sought to present the following question to this Court:

> Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, § 750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of § 750.227(b) where there is no evidence that weapon has been possessed for any other purpose than commission of underlying felony, where underlying felony is specifically charged as felony

> element of firearms possession charge, and where (in armed robbery case) state has already augmented punishment for armed robberies above punishment imposed for unarmed robberies.

26 Crim.L.Rep. 4113. (§ 750.227(b), M.C.L.A. appears in Appendix D).

Petitioner submits that this Court's summary dismissal in *Brintley* v. *Michigan, supra,* was a disposition on the merits which conflicts with the Missouri Supreme Court's decisions rendered in *Sours* I and *Sours* II. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves, undisturbed, the original judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

While summary actions by this Court should not be understood as breaking new ground, they should prevent lower courts from coming to contrary conclusions on identical issues. *Mandel* v. *Bradley, supra.* It is clear that the Missouri Supreme Court in *Sours* II has come to a conclusion contrary to that reached by this Court in *Brintley* v. *Michigan, supra.* The Michigan statute, which appears in Appendix D, is remarkably similar to the Missouri armed criminal action statute. The issue summarily dismissed, for want of a substantial federal question in *Brintley,* is precisely the same issue the Missouri Supreme Court found to be dispositive in its reversal of respondent's conviction for armed criminal action in *Sours* I and II.

This Court has manifested its disapproved of state court expansion of federal constitutional rights as evidenced by this Court's opinion rendered in *Oregon* v. *Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), where it was stated:

> A state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. [citation omitted]. But, of course, a state may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.

Id., 420 U.S. at 719. See also *North Carolina* v. *Butler*, 441 U.S. 369, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979).

Petitioner submits that the Missouri Supreme Court misinterpreted this Court's decision rendered in *Whalen* v. *United States, supra.* The Missouri Supreme Court quite clearly disregarded the Court's conclusion, reached in *Whalen,* that:

> In the present case, therefore, if Congress has not authorized cumulative punishment for rape and for an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced. The *dispositive* question, therefore, is whether Congress did so provide.

Whalen v. *United States,* 100 S.Ct. at 1436. (Emphasis added). It appears that the Missouri Supreme Court misinterpreted the following words of this Court:

> The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to proscribe the punishments to be imposed upon those found guilty of them, resides *wholly* with the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates

> not only the specific guarantee against double jeopardy but also the Constitutional principle of separation of powers in a manner which trenches particularly harshly on individual liberty.

Whalen v. *United States,* 100 S.Ct. 1436-1437 [Citations and footnote omitted.] [Emphasis added.]

Further evidence of the Missouri Supreme Court's failure to grasp the import of the *Whalen* decision is its inability to recognize dispositive language in the *Whalen* decision. In discussing *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (which this Court found to be incorporated in the District of Columbia Code), the majority in *Whalen* stated that:

> We think that the only correct way to read § 23-112, in light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule of construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed 'shall, unless the court expressly provides otherwise, run consecutively.' [footnote omitted] And where the offenses are the same under that test, the cumulative sentences are not permitted, *unless elsewhere specifically authorized* by Congress.

Whalen v. *United States,* 100 S.Ct. at ____. [Emphasis added.] That the Missouri Supreme Court misapplied the *Blockburger* rule is further evidenced by this Court's recent opinion in *Illinois* v. *Vitale,* 27 Crim.L.Rep. 3190, wherein the test is characterized as follows:

> In *Brown* v. *Ohio,* 432 U.S. 161 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring *successive* prosecutions. Quoting from *Blockburger* v. *United*

States, 284 U.S. 299, 304 (1932), which in turn relied on *Gavieres* v. *United States,* 220 U.S. 338, 342-343 (1911), we held that

> 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'

Illinois v. *Vitale, supra.*

Petitioner submits that a definitive decision by this Court, on this federal constitutional issue is necessary in this case. Diametrically opposed views exist regarding this issue in different jurisdictions, both state and federal. There appears to be conflicting views on this issue between the Missouri Supreme Court and the Eighth Circuit Court of Appeals.

The following cases from other jurisdictions have found that armed robbery and the use of a firearm in the commission of a felony are distinct offenses under the tests set forth in *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), because it was held that the charge of robbery contains elements not necessarily included in the felony firearms offense. *State* v. *Saxon,* 193 Neb. 278, 226 N.W.2d 765 (1975); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir. 1976), *cert. denied,* 429 U.S. 844 (1976); *Wayne County Prosecutor* v. *Recorder's Court Judge,* 406 Mich. 374, 280 N.W.2d 793 (1979) (decision of the Michigan Supreme Court giving rise to this Court's decision in *Brintley* v. *Michigan*); *Jones* v. *Commonwealth of Virginia,* 235 S.E.2d 313 (1977); *United States* v. *Hearst,* 412 F.Supp. 877 (N.D.Calif. 1976).

The Missouri Supreme Court recognized but neglected the foregoing authority and chose to follow cases from

other jurisdictions which it felt supported its view that the double jeopardy clause prohibits punishing a person twice for the same offense in a single prosecution. *State* v. *Pinder,* 375 So.2d 836, 838 (Fla. 1979); *Tyson* v. *State,* 386 N.E.2d 1185, 1193 (Ind. 1979); *State* v. *Frye,* 283 Md. 709, 393 A.2d 1372, 1375 (1978); *Briggs* v. *State,* 573 S.W. 2d 157, 159 (Tenn. 1978).

The dire need for a decision of this Court in regard to this federal constitutional issue is exemplified by recent decisions of certain state supreme courts which conflict in their interpretation of the federal double jeopardy clause. In *Whack* v. *State,* 416 A.2d 265 (Md. 1980), the Court of Appeals of Maryland (highest state court) held that imposition of punishment for both robbery with a dangerous or deadly weapon and the separate crime of use of a handgun in the commission of a felony does not violate the Fifth Amendment prohibition against double jeopardy. Conversely, the Supreme Court of Delaware, in *Hunter* v. *Delaware,* No. 215 (March 15, 1980), held that the double jeopardy clause prevented imposing punishment for both assault in the first degree and the separate crime of possession of a deadly weapon during the commission of a felony.

An immediate decision on this federal constitutional issue is necessary; even the Missouri Supreme Court so stated in *Sours* II: "Following the original *Sours* opinion our prosecutors and penal authorities indicated informally to this Court [sic] that they believed that as many as four-hundred to six-hundred prior convictions might be affected by the opinion." *Sours* II, *slip opinion* at 12.

Every jurisdiction in this country is anxiously awaiting a definitive decision by this Court in this case because the facts and federal constitutional issue here present an excellent opportunity for this Court's review; this is especially true since the legislative intent issue has been deter-

mined and no further state grounds remain in the case. Finally, a decision is necessary because there exist decisions of this Court conflicting with the Missouri Supreme Court's decision in *Sours* II. Therefore, it is respectfully requested that this Court issue the writ and resolve the bewilderment regarding double jeopardy not only in the State of Missouri, but in every jurisdiction within this country.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

SUPREME COURT OF MISSOURI
EN BANC

WILLIAM SCOTT SOURS, *Appellant,* vs. STATE OF MISSOURI, *Respondent.*	**No. 61458**

August 18, 1980

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable Ben F. Pyle, Judge

Appellant, William Scott Sours, pleaded guilty to two counts of an information filed June 20, 1977. Count I charged appellant with first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975; Count II charged armed criminal action, § 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978). A separate punishment was imposed for each count. Appellant sought relief from his convictions in a collateral proceeding under Rule 27.26. In Sours v. State, 593 S.W.2d 208 (1980), we reversed the judgment of the trial court insofar as it denied appellant relief from his conviction for armed criminal action, and vacated and set aside that conviction on the ground that the conviction placed appellant twice in jeopardy for the same offense. We affirmed the judgment insofar as it denied appellant

relief from his conviction for robbery first degree. The United States Supreme Court vacated our decision and remanded the case for reconsideration in the light of Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432 (1980). Missouri v. Sours, No. 79-1565, filed May 27, 1980. The detailed facts and prior procedural history of this case may be found in this Court's earlier opinion, 593 S.W.2d at 210.

The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal Constitution. The Court expressly declined to rule on this issue in Simpson v. United States, 435 U.S. 6 (1978). *Cf.* Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432 (1980). Each time a similar double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did not intend to separately punish the two offenses involved. Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432, 1435 (1980); Simpson v. United States, 435 U.S. 6, 11 (1978); Iannelli v. United States, 420 U.S. 770, 785-86 nn. 17-18 (1975). *See* Jeffers v. United Stataes, 432 U.S. 137, 155 (1977). No United States Supreme Court opinion has considered a statute that contained wording similar to or identical to that found in Missouri's armed criminal action statute.

In *Whalen,* the defendant was convicted of rape, D.C. Code Ann. § 22-2801, and of felony-murder, *i.e.*, the killing of the rape victim in the course of the rape, D.C. Code Ann. § 22-2401. He was sentenced to consecutive terms of imprisonment of 20 years to life for first degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed, 379 A.2d 1152. The United

States Supreme Court reversed, holding that under D.C. Code Ann. § 23-112,[1] Congress did not intend that multiple punishments be imposed for two offenses arising out of the same criminal transaction unless each offense requires proof of a fact which the other does not. The Court stated that

> Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape. See *United States* v. *Greene*, 160 U. S. App. D. C. 21, 489 F.2d 1145, 1158 (1973). Cf. *Harris* v. *Oklahoma*, 433 U.S. 682, 682-683 [1977].

—— U.S. at ——, 100 S.Ct. at 1439. The Court expressly reserved the question whether, had Congress clearly intended to impose multiple punishments for the same offense, the imposition of such punishment would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation from the constitu-

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[1]D.C. Code Ann. § 23-112 provides:

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

The Court stated that, although the phrasing of this statute was "less than felicitous," it would be construed to mean "that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense 'requires proof of a fact which the other does not.'" —— U.S. at ——, 100 S.Ct. at 1438.

tional question. The Court stated that, if the matter of whether it must defer to the construction given D.C. Code Ann. §§ 22-2801 and 22-2401 by the District of Columbia Court of Appeals were absent, "we would as a matter of course first decide the petitioner's statutory claim, and, only if that claim were rejected, would we reach the constitutional issue. See *Simpson* v. *United States,* 435 U.S. 6, 11-12." ____ 445 U.S. at ____, 100 S.Ct. at 1435. Accordingly, since the Court did not reject the petitioner's statutory claim, it did not reach the constitutional issue presented.[2]

Mr. Justice Blackmun, concurring in the judgment in *Whalen* (Mr. Justice White filed an opinion concurring in part and concurring in the judgment and Mr. Justice Rehnquist filed a dissenting opinion in which Mr. Chief Justice Burger joined) stated that prior cases had wrongly suggested:

that the Double Jeopardy Clause may prevent the im-

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[2]The Court stated:

> Because we have concluded that the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and because that error denied the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, we reserve the judgment of the Court of Appeals.

____ U.S. at ____, 100 S.Ct. at 1437.

Mr. Justice Rehnquist, in his dissent in Busic v. United States, ____ U.S. ____, 100 S.Ct. at 1747 (1980), considered the decision in *Whalen* to have decided the very issue which it expressly reserved. He stated: "In *Whalen* v. *United States,* No. 78-5471 (filed April 16, 1980), six Members of this Court held that Congress' intent to impose cumulative punishments at a single criminal proceeding completely controlled the question of double jeopardy." ____ U.S. at ____, 100 S.Ct. at 1759. The Court in *Whalen* in fact held that the case involved a congressional intent *not to impose* cumulative punishments at a single criminal proceeding. ____ U.S. at ____, 100 S.Ct. at 1439. Perhaps it is noteworthy that eight members of the Court did not join in Mr. Justice Rehnquist's reading of the holding of *Whalen.*

> position of cumulative punishments in situations in which the Legislative Branch *clearly intended* that multiple penalties be imposed for a single criminal transaction. See *Simpson* v. *United States*, 435 U.S. 6, 11-13 (1978); *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977) (plurality opinion). I believe that the Court should take the opportunity presented by this case to repudiate those dicta squarely, and to hold clearly that the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. I must conceded that the dicta that seemingly support a contrary view have caused confusion among state courts that have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishments.

—— U.S. at ——, 100 S.Ct. 1441. Clearly, the five justices who joined in the opinion of the Court in *Whalen* (Justices Stewart, Powell, Stevens, Brennan, and Marshall) declined Justice Blackmun's invitation to hold that the question of what punishments are constitutionally permissible can be reduced to the question of what punishment the legislature intended to be imposed. The two questions remain distinct.[3] The opinion of the Court in *Whalen* cited *Simp-*

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[3]Our refusal to collapse the constitutional question into the question of legislative intent does not commit us to the assumption, criticized by Mr. Justice Rehnquist, "that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses." *See Whalen*, —— U.S. at ——, 100 S.Ct. at 1443 (Mr. Justice Rehnquist, dissenting). On the contrary, we recognize that the legislature may divide the criminal transaction into its subatomic particles, into protons and neutrons and electrons, into particles of different electrical charges and weights and spins. We hold only that, once the definition of a crime is fixed as a configuration of such elements, the state may not, consistently with the due process clause and the double jeopardy clause, impose separate punishments both for the neutron and for the atom of which it is a part.

son with approval for its separation of the statutory claim from the constitutional issue and for its avoidance of the constitutional issue by finding that the legislature did not intend multiple punishments. ____ U.S. at ____, 100 S. Ct. at 1435.

Our original opinion discussed in detail two recent United States Supreme Court cases in which the question whether the legislature intended to subject the defendant to multiple penalties for a single criminal transaction was carefully distinguished from the question whether cumulative punishments for the two offenses are constitutionally permissible. Simpson v. United States, 435 U.S. 6, 11 (1978); Jeffers v. United States, 432 U.S. 137, 155 (1977) (plurality opinion). *See* Sours v. State, 593 S.W.2d 208, 214-16 (1980).

The decision of the United States Supreme Court to vacate the original judgment of this Court and to remand this case "for further consideration in light of Whalen v. United States, 445 U.S. ____ (1980)," mandates that we reexamine the intent of the General Assembly in enacting § 559.225, RSMo Supp. 1976. In *Whalen,* the Court determined that Congress did not intend to punish the petitioner both for committing rape and for committing a killing in the course of the rape. In reaching this conclusion, the Court applied to D.C. Code Ann. § 23-112 the doctrine of Blockburger v. United States, 284 U.S. 299 (1932) as "a rule of statutory construction." ____ U.S. at ____, 100 S.Ct. at 1438. In *Blockburger,* the Court held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. The *Blockburger* rule has often been cited by the Court. At times it has been presented as a rule of

statutory construction, but more often it has been used as the definition of "same offense" for double jeopardy purposes.[4] Whalen v. United States, ____ U.S. at ____,

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[4]In numerous decisions of the United States Supreme Court from 1902 to 1959, the same evidence test was uniformly treated as the definition of sameness of offense for double jeopardy purposes. The same evidence test was used more frequently in the single prosecution multiple punishment context than it was in the multiple prosecution context. Harris v. United States, 359 U.S. 19, 23-24 (1959) (single proceeding; convictions and punishments for purchasing heroin from an unstamped package, a violation of 26 U.S.C. § 4704(a), and for receiving and concealing the same knowing it to have been unlawfully imported, a violation of 21 U.S.C. § 174, affirmed; offenses held distinct under same evidence test); Gore v. United States, 357 U.S. 386, 388-91 (1958) (single proceeding; convictions and punishments for sale and distribution of heroin and cocaine not in the original stamped package, a violation of 26 U.S.C. § 4704(a), for sale of the drugs not pursuant to an order written on the requisite Treasury form, a violation of 26 U.S.C. § 4705(a), and for facilitating concealment and sale of the drugs, a violation of 21 U.S.C. § 174, affirmed; offenses held distinct under same evidence test); Pereira v. United States, 347 U.S. 1, 9, 11-12 (1954) (single proceeding; convictions and punishments for mail fraud a violation of 18 U.S.C. § 1341, for transporting stolen property in interstate commerce, a violation of 18 U.S.C. § 2314, and for conspiracy to commit both offenses, a violation of 18 U.S.C. § 371, affirmed; offenses held distinct under same evidence test); United States v. Michener, 331 U.S. 789 (1947) (per curiam) (single proceeding; convictions and punishments for procuring a plate from which genuine $10 Federal Reserves Notes had been printed, and of having possession of such a plate, violations of 18 U.S.C. § 264; offenses held distinct under same evidence test; reversing 157 F.2d 616 (8th Cir. 1946)); American Tobacco Co. v. United States, 328 U.S. 781, 787-89 (1946) (single proceeding; convictions and punishments for conspiracy in restraint of trade, monopolization, and conspiracy to monopolize under Anti Trust Sherman Act; offenses held distinct under same evidence test); United States ex rel. Marcus v. Hess, 317 U.S. 537, 552 (1943) (single proceeding; convictions for 56 instances of defrauding the United States through collusive bidding on P.W.A. projects, violations of 18 U.S.C. §§ 80, 83, and separate forfeitures of $2,000 per instance plus double damages affirmed; the incidence of fraud on each project held distinct offense under same evidence test); Blockburger v. United States, 284 U.S. 299, 304 (1932) (single proceeding; convictions and punish-

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100 S.Ct. at 1438 (1980); Simpson v. United States, 435 U.S. 6, 11, (1978); Brown v. Ohio, 432 U.S. 161, 166, (1977); Jeffers v. United States, 432 U.S. 137, 151 (1977) (plurality opinion) (see opinion of White, J., concurring in part and dissenting in part, at 158); Iannelli v. United States, 420 U.S. 770, 785 n. 17, (1975).

Footnote continued
ments for sale of morphine not in or from the original stamped package and for sale not pursuant to a written order on the requisite Treasury form affirmed; offenses held distinct under same evidence test); King v. United States, 280 U.S. 521 (1929) (per curiam) (two proceedings; plea of former jeopardy rejected where sentence for selling morphine not in or from the original stamped package was imposed in one proceeding and executed before second indictment charging interstate shipment of drugs by a person who has not registered and paid the special tax required was brought; offenses held distinct under same evidence test; affirming 31 F.2d 17 (8th Cir. 1929)); Albrecht v. United States, 273 U.S. 1, 11-12 (1927) (single proceeding; convictions and punishments for four counts of illegal possession of liquor and four counts of illegal sale of liquor in violation of the National Prohibition Act and one count of maintaining a common nuisance affirmed; sale and possession held distinct under same evidence test); Morgan v. Devine, 237 U.S. 632, 638-39, 641 (1915) (single proceeding; convictions and sentences on guilty pleas to charges of unlawful forcible breaking into a post office building with intent to commit larceny, a violation of § 192 of the Penal Code, and of stealing postage stamps and funds belonging to the United States, a violation of § 190 of the Penal Code, affirmed; offenses held distinct under the same evidence test; using same evidence test for two purposes—both to determine the legislative intent and separately to respond to the double jeopardy claim); Ebeling v. Morgan, 237 U.S. 625, 630-31 (1915) (single proceeding; convictions and punishments for six counts of tearing, cutting, and injuring United States mailbags, in violation of § 189 of the Federal Criminal Code, affirmed; offenses held distinct under the same evidence test); Gavieres v. United States, 229 U.S. 338, 343-44 (1911) (two proceedings; conviction and punishment for insulting a public officer by deed or word in his presence, a violation of article 257 of the Penal Code of the Philippine Islands, after previous conviction because of the same words and conduct of behaving in an indecent manner in a public place, a violation of an ordinance of the city of Manila; offenses held distinct under the same evidence test); Carter v. McClaughry, 183 U.S. 365,

(Continued on next page)

In *Whalen,* the Court stated that the *Blockburger* rule had been consistently relied on ever since it was first stated in 1932:

> to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively. The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize

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Footnote continued
394-95, 398 (1902) (single court martial proceeding; conviction and punishment for conspiring to defraud the United States, a violation of the 60th article of war, for causing false and fraudulent claims to be made against the United States, a violation of the 60th article of war, for conduct unbecoming an officer and a gentleman, a violation of the 61st article of war, and for committing embezzlement, a violation of § 5488 of the Revised Statutes of the United States and of the 62nd article of war, held to be within the jurisdiction of the court martial; offenses held distinct under the same evidence test); In re Nielsen, 131 U.S. 176, 188, 190-91 (1889) (two indictments; conviction and punishment on a guilty plea to bigamy, *i.e.* living with more than one woman as husband and wife continuously from October 15, 1885, to May 13, 1888; second indictment charged adultery with one of the two women occurring on May 14, 1888; convicted for unlawful cohabitation held to bar a subsequent prosecution for adultery under the same evidence test, since the continuous bigamy offense necessarily implied sexual intercourse, so that proof of adultery did not require proof of a fact not also required to show bigamy).

The claim that the meaning of the phrase "same offense" in the multiple punishment context is in fact different from the meaning of the phrase "same offense" in the multiple prosecution context requires justification. We can find nothing in the legislative intent to impose two punishments, one for the greater offense and one for the lesser included offense, which would justify refusing to classify the two crimes as the "same offense" under the double jeopardy clause. If a state legislature could manipulate the meaning of the phrase "same offense" as it is used in the fifth amendment to the Constitution, there would be no reason to suppose that the Constitution prevents a legislaure from authorizing, by a clear expression of intent, the sequential prosecution and punishment of the greater and lesser included offense.

cumulative punishments *in the absence of a clear indication of contrary legislative intent.*

—— U.S. at ——, 100 S.Ct. at 1438. (Emphasis added.)

I. LEGISLATIVE INTENT

Applying *Blockburger* as a rule of statutory construction to the armed criminal action statute[5] and the statute

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[5]Section 559.225, RSMo Supp. 1976, defined the crime of armed criminal action and fixed the punishment for that crime as follows:

559.225. Armed Criminal Action—penalty—exceptions.—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed, by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

defining the underlying offense, in this case the robbery first degree statute,[6] we find that it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for committing robbery first degree "by, with, or through the use, assistance, or aid of a dangerous or deadly weapon," § 559.225, RSMo Supp. 1976, cannot be had without proving all the elements of the offense of robbery first degree. *See* Vitale v. United States, 48 U.S.L.W. 4741, 4744, No. 78-1845, filed June 19, 1980; *Whalen,* ____ U.S. at ____, 100 S.Ct. at 1439; Harris v. Oklahoma, 433 U.S. 682, 682-83 (1977); United States v. Greene, 160 U. S. App. D. C. 21, 489 F.2d 1145, 1158 (1973). Thus, the General Assembly should be presumed not to have intended that punishment be imposed under both statutes. ____ U.S. ____, 100 S.Ct. at 1438. Nevertheless, we find that the General Assembly has in clear

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[6]The underlying felony in this case was robbery first degree, as it was defined in § 560.120, RSMo 1969, and the punishment for which was prescribed in § 560.135, RSMo Supp. 1975. Section 560.120, RSMo 1969, provided:

> Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent, by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo Supp. 1975, provided:

> Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

and unequivocal terms expressed in § 559.225, RSMo Supp. 1976, its intent to authorize conviction and punishment for armed criminal action and for the underlying felony. In arriving at this conclusion, we apply every test and standard available to us under Missouri law. First, we consider the plain meaning of the language used. We consider the requirements of our own constitution regarding construction of the statute. We examine every reported decision involving convictions under the armed criminal action statute, in order to discern the application given the statute by Missouri's courts and prosecutors in prior cases. We examine the form of the information or indictment used to charge armed criminal action, both before and after a standard form for charging armed criminal action was approved; and we examine the form of the jury instructions used in submitting a charge of armed criminal action, both before and after a pattern instruction for submitting armed criminal action was approved.

The language of the armed criminal action statute shows that the General Assembly clearly intended that a defendant convicted of armed criminal action shall be punished for both armed criminal action and for the underlying felony. Section 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978) expressly provides that "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon *is also guilty of the crime of armed criminal action.*" (Emphasis added.) The armed criminal action statute provides in three separate subsections for punishment of not less than three years' imprisonment for the first offense, not less than five years' imprisonment for the second offense, and not less than ten years' imprisonment for the third. The legislative intent to impose punishment both for the underlying felony and for the "compound" offense of which

it is a part is clearly and unambiguously expressed in the following sentence, which appears in each of the three subsections: "The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous [instrument] or deadly weapon." There is nothing ambiguous or uncertain about the meaning of this provision. The statute provides that the state may punish for any felony and also punish for that felony a second time in virtue of its having been committed through the use of a dangerous or deadly weapon. This is the plain meaning of the words used, and it is the unmistakable intent of our General Assembly. Clearly, § 559.225, RSMo Supp. 1976, provides for more than the mere enhancement of the sentence for the underlying felony. It calls for conviction of a second crime and for the imposition of a second sentence. Consequently, we cannot avoid the question whether the double jeopardy clause prohibits the imposition in a single proceeding of multiple punishments for the same offense.

What was said in City of St. Louis v. Crowe, 376 S.W.2d 185 (Mo. 1964) is fully applicable to our armed criminal action statute:

> This section of the statutes now under scrutiny is clear and unambiguous in its language. It is not susceptible of more than one construction. Therefore, we may not resort to any extraneous matter because there is no room for construction of such language. State ex rel. Bell v. Phillips Petroleum Co., 349 Mo. 360, 160 S.W.2d 764; Rathjen v. Reorganized School Dist. R-II of Shelby County, 365 Mo. 518, 284 S.W.2d 516. We have no right to read into the statute an intent which is contrary to the legislative intent made evi-

> dent by the phraseology employed. State ex inf. Rice ex rel. Allman v. Hawk, 360 Mo. 490, 228 S.W.2d 785; Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577. The legislative pronouncement means what it says. . . .

376 S.W.2d at 189-90. *See* State ex rel. Stevenson v. Kirkpatrick, 536 S.W.2d 740, 741 (Mo. banc 1976); State ex rel. Dravo Corp. v. Spradling, 515 S.W.2d 512, 517 (Mo. 1974); Missourians for Honest Elections v. Missouri Elections Commission, 536 S.W.2d 766, 775 (Mo.App. 1976); Consolidated School District No. 1 of Jackson County v. Bond, 500 S.W.2d 18, 21 (Mo.App. 1973). *See also* J. Sutherland, 2A Statutes and Statutory Construction § 46.01, pp. 48-49 (C. Sands 4th ed. 1973).

We note that we are not free to construe the armed criminal action statute as a mere punishment-enhancement statute which amends by implication numerous felony statutes, because Mo. Const. art III, § 28 prohibits the General Assembly from amending statutes without setting forth in full the statutes so amended. Sours v. State, 593, S.W.2d 208, ____ 222 n. 10 (Mo. banc 1980); State v. Valentine, 584 S.W.2d 92, 96 (Mo. banc 1979). *Cf.* State v. Hudson, 562 S.W.2d 416 (Tenn. 1978).

The uniformity of the interpretation and application of § 559.225, RSMo Supp. 1976 (§ 571.015, RSMo 1978), confirms that it plainly authorizes punishment both for armed criminal action and for the underlying felony. Following the original *Sours* opinion our prosecutors and penal authorities indicated informally to this Court that they believed that as many as four hundred to six hundred prior convictions might be affected by the opinion. In the four years since the enactment of the statute, the appellate courts of this state have been called upon literally dozens of times to review convictions for both armed criminal action and

the underlying felony.[7] In none of these cases was it ever questioned that the legislature intended to say exactly what it said in the armed criminal action statute. No case has been discovered where the armed criminal action statute has not been understood by our trial and appellate judges

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[7]State v. Valentine, 584 S.W.2d 92 (Mo. banc 1979) (per Rendlen, J.) (affirming unspecified sentences for both armed criminal action and robbery first degree); State v. Treadway, 558 S.W.2d 646 (Mo. banc 1977), *cert. denied*, 439 U.S. 838 (1978) (per Donnelly, J.) (three year sentence for armed criminal action and fifteen years for robbery first degree, to run consecutively); State v. Merritt, 591 S.W.2d 107 (Mo.App. 1979) (per Manford, J.) (five years for armed criminal action to run concurrently with consecutive sentences of twenty years for robbery first degree and five years for assault with intent to kill with malice); State v. Irvin, 590 S.W.2d 699 (Mo.App. 1979) (per Clemens, Sr.J.) (five years for armed criminal action to run consecutively to twenty years for robbery); Riley v. State, 588 S.W.2d 738 (Mo.App. 1979) (per Kelly, J.) (three years for armed criminal action to run consecutively to concurrent sentences of seventeen years each for two counts of robbery first degree and one count of assault with intent to kill. State v. Pollard, 588 S.W.2d 212 (Mo.App. 1979) (per Swofford, J.) (five years for armed criminal action to run concurrently with five years for sodomy and to run consecutively to twenty-five years with rape. State v. Medley, 588 S.W.2d 55 (Mo.App. 1979) (per Pudlowski, J.) (three years for armed criminal action and twenty years for robbery first degree); State v. Mays, 588 S.W.2d 6 (Mo.App. 1979) (per Reinhard, P.J.) (five years for armed criminal action to run consecutively to fifteen years for robbery first degree); State v. Tyler, 587 S.W.2d 918 (Mo.App. 1979) (per Kennedy, J.) (twenty-five years for armed criminal action to run consecutively to seventy-five years for robbery first degree, seventy-five years for rape, and ten years for kidnapping); State v. Williams, 587 S.W.2d 618 (Mo.App. 1979) (per Crist, J.) (five years for armed criminal action to run concurrently with twenty years for robbery first degree); State v. Gant, 586 S.W.2d 755 (Mo.App. 1979) (per Somerville, P.J.) (reversing conviction for armed criminal action where armed criminal action in conjunction with assault was charged but armed criminal action in conjunction with murder was submitted in jury instructions); State v. Crews, 585 S.W.2d 131 (Mo. App. 1979) (per Gunn, J.) (sentences unspecified; underlying felony unspecified; convictions for armed criminal action, first degree robbery, and three counts of assault with intent to kill with malice); State v. Brown, 584 S.W.2d 413 (Mo.App. 1979) (per Reinhard, P.J.) (thirty

(Continued on next page)

and by our prosecutors, assistant attorneys general, and Attorney General to mean that punishment may be imposed once for a felony and a second time ("in addition to") for the same felony if it was committed by the use, aid, or assistance of a dangerous or deadly weapon. No amount

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Footnote continued
years for one count of armed criminal action to run concurrently with ten years each for two counts of robbery first degree); State v. Jones, 583 S.W.2d 561 (Mo.App. 1979) (per Clemens, J.) (three years for armed criminal action to run consecutively to robbery first degree) (reversed and remanded for error in admission of heresay); State v. Burse, 583 S.W.2d 221 (Mo.App. 1979) (per Crist, J.) (thirty-five years for armed criminal action to run concurrently with eight years for attempted robbery first degree); State v. Davidson, 583 S.W.2d 208 (Mo.App. 1979) (per Higgins, Sp.J.) (unspecified sentences for one count of armed criminal action and two counts of robbery first degree); State v. Hutchinson, 582 S.W.2d 350 (Mo.App. 1979) (per Crist, J.) (twenty-five years for one count of armed criminal action to run concurrently with concurrent sentences of twenty-five years each for eight counts of robbery first degree); State v. Hawkins, 582 S.W.2d 333 (Mo.App. 1979) (per Pritchard, J.) (underlying felony unspecified; three years for armed criminal action to run consecutively to ten years for robbery first degree and fifteen years for assault with intent to do great bodily harm with malice) (reversed for defect in jury panel); State v. Burns, 581 S.W.2d 590 (Mo.App. 1979) (per Reinhard, P.J.) three years for armed criminal action to run consecutively to fifteen years for robbery first degree); State v. Bargeon, 578 S.W.2d 364 (Mo.App. 1979) (per Gunn, J.) (twenty-five years for armed criminal action to run consecutively to seventy-five years for rape); State v. Jones, 578 S.W.2d 286 (Mo.App. 1979) (per Reinhard, P.J.) (underlying felony unspecified; five years for armed criminal action to run consecutively to consecutive sentences of ten years for forcible rape and five years for robbery first degree); State v. Carter, 577 S.W.2d 109 (Mo.App. 1978) (per Welborn, Sp.J.) (five years for armed criminal action to run concurrently with ten years for robbery first degree); State v. Woods, 578 S.W.2d 942 (Mo.App. 1978) (per Clemens, J.) (three years for armed criminal action to run consecutively to twenty years for robbery first degree); State v. Tilley, 569 S.W.2d 346 (Mo.App. 1978) (per Reinhard, J.) (fifteen years for armed criminal action to run consecutively to ten years for attempted robbery in the first degree); Simms v. State, 568 S.W.2d 801 (Mo.App. 1978) (per McMillian, J.) (three years for armed criminal action to run consecutively to twelve years for robbery first degree).

of analysis premised on presumptions concerning legislative intent can obscure the fact that § 559.225, RSMo Supp. 1976, provides that a person guilty of armed criminal action shall be punished for both of two crimes, one of which by definition includes every element of the other.

This construction of our state statute is binding on the United States Supreme Court. In Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973), the United States Supreme Court stated "[I]t is not our function to construe a state statute countrary to the construction given it by the highest court of a state." *Id.* at 256; O'Brien v. Skinner, 414 U.S. 524, 531 (1973).

In the reported decisions involving convictions for both armed criminal action and the underlying felony, the armed criminal action charge was entered in a separate count from that charging the underlying felony. The two count information in the instant case is typical.

Count I alleged:

> that on or about the 14th day of May, 1977, in the County of Jasper and State of Missouri, WILLIAM S. SOURS did wilfully, unlawfully and feloniously by means of a certain dangerous and deadly weapon, to-wit: a handgun, take, stea[l] and carry away Nine Hundred Forty-nine and 06/100 ($949.06) Dollars, lawful money of the United States of America, the money and personal property of Mr. Quick, then and there in the lawful care and custody of Kendall Carnes, by then and there putting the said Kendall Carnes in fear of an immediate injury to his person and then and there did feloniously rob, take, steal and carry away the said money and personal property from the person of, in the presence of and against the will of the said Kendall Carnes with the felonious intent to permanently deprive the owner of the use thereof and to convert the same to his own use.

Count II alleged:

> that on or about the 14th day of May, 1977, in the County of Jasper and State of Missouri, WILLIAM S. SOURS did wilfully, unlawfully and feloniously commit a felony, to-wit: Robbery First Degree, by and with the use, aid and assistance of a dangerous or deadly weapon, to-wit: a handgun.

See Jeffers v. United States, 432 U.S. 137, 150 n. 16 (1977).

This Court recently approved a patterned charge for use in charging armed criminal action, MACH-Cr 25.02, the patterned charge is as follows:

> The (Grand Jurors) (Circuit Attorney) (Prosecuting Attorney) of the (City) (County) of _____, State of Missouri, charge(s) that the defendant, in violation of Section 571.015, RSMo, committed the class A felony of armed criminal action, punishable upon conviction under Section (571.015.1) (571.015.2) (571.015.3), RSMo, in that (on) (on or about) [*date*], in the (City) (County) of _____, State of Missouri, the defendant [*insert one of the following, omitting number and brackets*]
>
> [*1*] committed the felony of [*name of felony*] charged in Count ____, all allegations of which are incorporated herein by reference, and
>
> [*2*] committed the felony of [*name of felony, alleging all essential elements thereof with the same specificity as that used in a charge of that felony*], and
>
> The defendant committed the foregoing felony of [*name of felony*] by, with and through the use, assistance and aid of a (dangerous instrument) (deadly weapon) (, and)
>
> ((On) (On or about) [*date*] in [*identify the par-*

ticular court and jurisdiction], the defendant was convicted of the offense of armed criminal action (, and))

((On) (On or about) [*date*] in [*identify the particular court and jurisdiction*], the defendant was convicted of the offense of armed criminal action)).

Both pre-patterned and patterned charges indicate that our statute has been universally interpreted to permit the charging of armed criminal action and the underlying felony in separate counts.

Similarly, the instructions commonly used to submit to the jury the question of the guilt or innocence of the accused of armed criminal action and of the underlying felony illustrate that the statute has uniformly been interpreted to authorize separate conviction and punishment for both armed criminal action and the underlying felony, as does our recently adopted pattern jury instruction, MAI-Cr 25.02. The verdict-directing instructions used in State v. Treadway, 558 S.W.2d 92 (Mo. banc 1979) are typical:

INSTRUCTION NO. 7

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on September 25, 1976, in the City of St. Louis, State of Missouri, Rotha Grimes was in charge of a purse owned by Jerry Hanks, and

Second, that at that time and place the defendant, acting with another, took the property from Rotha Grimes against her will be causing her to fear immediate injury to her person, and

Third, that the defendant, acting with another, took the property with the intent to permanently deprive Rotha Grimes and Jerri Hanks

of the property and to convert it or any part of it to the use of the defendant and another, and

Fourth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count I of robbery in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty of that offense. MAI-CR 7.60 modified by 2.12
Submitted by the State
Given by the Court

INSTRUCTION NO. 8

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that the defendant, acting with another, committed the crime of robbery in the first degree, a felony, as defined heretofore in Instruction No. 7, and

Second, that the perpetration of the aforesaid felony was done through the aid or use of a weapon, to-wit: a gun, held by either the defendant or his accomplice, and

Third, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count II of armed criminal action.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, then you must find the defendant not guilty under Count II of that offense.

Not in MAI-CR

Modified by 2.12

Submitted by the State

Given by the Court

INSTRUCTION NO. 9

The defendant is charged with a separate offense in each Count submitted to you. Each offense and the evidence and law applicable to it should be considered separately. Any evidence which was or has been limited to one of the offenses charged or one purpose should not be considered by you as to another offense charged or for any other purpose.

You may find the defendant guilty or not guilty on any or all of the Counts submitted against him.

MAI-CR-2.70

Given by the Court

Our pattern jury instructions for use in submitting armed criminal action, MAI-Cr2d 25.02, were promulgated effective January 1, 1979. The verdict-directing instruction which was provided for use in cases involving a first offender under the armed criminal action statute, and "where the underlying felony is charged in a separate count," is as follows:

(As to Count ____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that the defendant is guilty under Count ____ of ([*name of the offense, if it is a felony*

under all circumstances]) ([*name of the offense, and if it is a misdemeanor under some circumstances and a felony under other circumstances, include the circumstances making it a felony*]), and

Second, that the defendant committed that offense by, with or through the use, assistance or aid of a (dangerous instrument) (deadly weapon),

then you will find the defendant guilty (under Count ——) of armed criminal action.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

If you do find the defendant guilty (under Count ——) of armed criminal action, you will assess and declare his punishment at imprisonment by the division of corrections for a term fixed by you, but not less than three years or more than life imprisonment.

We have measured the legislature's intent regarding § 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978) by every test and standard available to us under the law of Missouri. The conclusion is inescapable that the Missouri General Assembly did intend to impose punishment for armed criminal action "in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous [instrument] or deadly weapon." The General Assembly did clearly intend to impose two separate punishments for armed criminal action and the lesser included offense.

At this point, the mandate that we reconsider in light of *Whalen* offers little help or guidance. In *Whalen* it was determined that Congress had not intended cumulative

punishments. The constitutional question could be and was reserved by the Court. In other cases in which the legislative intent was less clear than it is in the case of our armed criminal action statute, the constitutional question also has been reserved. Simpson v. United States, 435 U.S. 6, 11 (1978); Iannelli v. United States, 420 U.S. 770, 785-86 nn. 17-18 (1975). *See* Jeffers v. United States, 432 U.S. 137, 155 (1977). The unique wording of the Missouri statute and the clear, positive and unequivocal intent to doubly punish, does not leave us a similar option. The unique wording of the armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue.[8]

II. DOUBLE JEOPARDY AND MULTIPLE PUNISHMENT FOR THE SAME OFFENSE

There is little we can add to the analysis given the constitutional question in Sours v. State, 593 S.W.2d 208, 211-14, 218-21 (Mo. banc 1980), and we would incorporate that analysis by reference into our opinion today, and reinstate the opinion originally published. The argument can be reduced to a simple syllogism:

(i) The double jeopardy clause of the fifth amendment to the United States Constitution prohibits the state from punishing a person twice for the same offense. Benton v. Maryland, 395 U.S. 784, 793-96 (1969); North Carolina v. Pearce, 395 U.S.

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[8]Firm as our conviction may be that neither a citizen of Missouri nor a citizen of the United States should be twice punished for the same offense, to so hold under the Missouri Constitution would require reinterpretation of our own double jeopardy clause, Mo. Const. art I, § 19, which has been construed to apply "only where there has been an acquittal of the defendant by a jury." Murray v. State, 475 S.W.2d 67, 70 (Mo. 1972); Kansas City v. Henderson, 468 S.W.2d 48, 52 (Mo. 1971), *cert denied*, 404 U.S. 1004 (1971). *See* Sours v. State, 593 S.W.2d 208, 210 (Mo. banc 1980).

711, 717 (1969); State v. Neal, 514 S.W.2d 544, 548 (Mo. banc (1974); State v. Parsons, 513 S.W.2d 430, 437-38 (Mo. 1973).

(ii) Armed criminal action and the underlying felony used to prove armed criminal action—in this case, robbery first degree—are the same offense for double jeopardy purposes under the same evidence test, because it is not the case that proof of robbery requires proof of any fact not also required to prove armed criminal action. Vitale v. United States, No. 78-1845, filed June 19, 1980; Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432, 1439 (1980); Simpson v. United States, 435 U.S. 6, 11 (1978); Brown v. Ohio, 432 U.S. 161, 166 (1977); Jeffers v. United States, 432 U.S. 137, 151 (1977); Iannelli v. United States, 430 U.S. 770, 785 n. 17 (1975); Harris v. United States, 359 U.S. 19, 23-24 (1959); Gore v. United States, 357 U.S. 386, 388-91 (1958); Blockburger v. United States, 284 U.S. 299, 304 (1932); Carter v. McClaughry, 183 U.S. 365, 394-95, 398 (1902); Morey v. Commonwealth, 108 Mass. 433, 434 (1871).

(iii) Therefore, the double jeopardy clause prohibits separately punishing a person both for armed criminal action and for the underlying felony.

We continue to find this argument persuasive.

We may note that *Whalen's* application of the *Blockburger* doctrine as a rule of statutory construction paralleled the application given *Blockburger* in our effort to resolve the constitutional issue in *Sours*. Compare *Whalen*, ____ U.S. at ____, 100 St.Ct. at 1439, with *Sours*, 593 S.W.2d at 219. In *Sours*, we stated that if the underlying felony used to prove armed criminal action were a single named felony instead of a class of offenses, "it would be

obivous that armed criminal action includes all of the elements of the felony specified." We observed that "the result is no different where the statute refers to 'any felony.'" 593 S.W.2d at 219. In *Whalen,* the Court concluded that "[a] conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." ____ U.S. at ____, 100 S.Ct. at 1439. The Court rejected the government's contention that felony murder and rape were not the same offense under the same evidence test of *Blockburger.*

> The Government contends that felony murder and rape are not the "same offense" under *Blockburger,* since the former offense does not in all cases require proof of a rape; that is, D.C. Code § 22-2401 proscribes the killing of another person in the course of committing rape *or* robbery *or* kidnapping *or* arson, etc. Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing in the perpetration of a robbery—the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger.* In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense.
>
> There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it.

___ U.S. at ___, 100 S.Ct. at 1439.

The application of the same evidence test in *Sours* is also supported by the United States Supreme Court's holding in Vitale v. United States, No. 78-1845, (filed June 19, 1980), (48 U.S.L.W. 4741) a multiple prosecution case. In *Vitale,* respondent, a juvenile was convicted of failing to reduce speed to avoid an accident, a violation of § 11-601(a) of the Illinois Vehicle Code. The charge arose out of an accident in which an automobile driven by respondent struck and fatally wounded two small children. Subsequently, a petition for adjudication of wardship was filed against respondent in the Circuit Court of Cook County, charging Vitale with two counts of involuntary manslaughter. The Illinois Supreme Court upheld the dismissal of the second proceeding on the ground that it was barred by the double jeopardy clause. In re Vitale, 71 Ill.2d 229, 375 N.E.2d 87 (1978). The United States Supreme Court vacated the judgment and remanded the case for consideration whether the judgment was based on state or federal grounds. 439 U.S. 974 (1978). The Illinois Supreme Court certified that the judgment was based on federal constitutional grounds, and the United States Supreme Court again granted certiorari. ___ U.S. ___, 100 S.Ct. 42 (1979). The Court reaffirmed the principle that the double jeopardy clause not only prohibits multiple prosecutions for the same offense but also protects against imposing multiple punishments for the same offense. ___ 445 U.S. at ___, 48 U.S.L.W. at 4743. *Accord,* Brown v. Ohio, 432 U.S. 161, 165 (1977); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The Court in *Vitale* also reaffirmed its holding in Harris v. Oklahoma, 433 U.S. 682 (1977):

> In *Harris,* we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a

> subsequent prosecution against the same defendant for the robbery. The Oklahoma felony murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under *In re Neilsen,* 131 U.S. 176 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense—an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under *Brown,* the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.

—— U.S. at ——, 48 U.S.L.W. at 4744.

Despite the Illinois Supreme Court's assertion in *Vitale,* that "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter," and its conclusion that, "the greater offense is by definition the 'same' as the lesser offense included within it," 71 Ill.2d at 239, 375 N.E.2d at 91, the United States Supreme Court vacated the judgment and remanded the case for further proceedings "[b]ecause of our doubts about the relationship under Illinois law between the crimes of manslaughter

and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown." ____ U.S. at ____, 48 U.S.L.W. at 4744.

We are here forced to address the constitutional issue expressly reserved in *Whalen,* ____ U.S. at ____, 100 S.Ct. at 1435, 1437; *Simpson,* 435 U.S. at 11; and *Iannelli,* 420 U.S. at 785-86 nn. 17-18. *See Jeffers,* 432 U.S. at 155. We must conclude, for the reasons set forth in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), that the proof of the underlying felony—robbery first degree—does not require proof of a fact not also required to prove armed criminal action, or in other words, that proof of armed criminal action necessarily proves every fact required to establish the underlying felony. Consequently, the two offenses are the "same offense" for double jeopardy purposes, *Vitale,* ____ U.S. at ____, 48 U.S.L.W. at 4744; *Whalen,* ____ U.S. at ____, 100 S.Ct. at 439; *Harris,* 433 U.S. at 682; *Brown,* 432 U.S. at 167, and the double jeopardy clause prohibits the state from punishing appellant for both offenses. We believe that, because the double jeopardy clause prohibits punishing a person twice for the same offense, "the prosecution may not do in one trial what it is prohibited from doing in two trials." Elmore v. State, 382 N.E.2d 893, 894-95 (Ind. 1978). See cases that apply the rationale of Harris v. Oklahoma in the single prosecution context. State v. Morgan, 592 S.W.2d 796, 803 (Mo. banc 1980); State v. Pinder, 375 So.2d 836, 838 (Fla. 1979); Tyson v. State, 386 N.E.2d 1185, 1193 (Ind. 1979); Mitchell v. State, 382 N.E.2d 932, 934 (Ind. 1978); Elmore v. State, 382 N.E.2d 893, 894-95 (Ind. 1978); State v. Frye, 283 Md. 709, 393 A.2d 1372, 1375 (1978); Briggs v. State, 573 S.W.2d 157, 159 (Tenn. 1978). *See also* State v. Neal, 514 S.W.2d

544, 548 (Mo. banc 1974); State v. Parsons, 513 S.W.2d 430, 438 (Mo. 1974).

If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen* was intended to lead this Court to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of "same offense" under the double jeopardy clause. It would grant to the state legislature the power to define the meaning of "same offense" as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it.

After thorough examination of the opinions in Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432 (1980), we have concluded that our original opinion and judgment in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), was correct and should be reinstated as supplemented by our opinion today. We reverse the judgment of the trial court insofar as it denied appellant relief from his conviction for armed criminal action, and vacate and set aside that conviction. We affirm the judgment of the trial court inso-

far as it denied appellant relief from his conviction for robbery first degree.

WARREN D. WELLIVER, Judge

Bardgett, C. J., Seiler, Morgan and Higgins, JJ., concur; Donnelly, J. dissents in separate dissenting opinion filed; Rendlen, J. dissents in separate dissenting opinion filed and concurs in dissenting opinion of Donnelly, J.

IN THE

SUPREME COURT OF MISSOURI
EN BANC

WILLIAM SCOTT SOURS, *Appellant,* vs. STATE OF MISSOURI, *Respondent.*	**No. 61458**

DISSENTING OPINION

In Benton v. Maryland, 395 U.S. 784 (1969), the United States Supreme Court overruled Palko v. Connecticut, 302 U.S. 319 (1937) and applied the Double Jeopardy Clause of the United States Constitution to the states.

In Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), a majority of this Court ordered a conviction under Missouri's armed criminal action statute set aside because it felt compelled to do so by general declarations of law made in Harris v. Oklahoma, 433 U.S. 682 (1977).

On May 27, 1980, in Missouri v. Sours, No. 79-1565, the United States Supreme Court vacated the judgment of this Court in *Sours,* and remanded the case to this Court "for further consideration in light of *Whalen* v. *United States,* 445 U.S. ____ (1980)."

Of course, the mandate of May 27, 1980, is the law of the case and is binding on this Court.

In North Carolina v. Pearce, 395 U.S. 711, 717 (1969),

the United States Supreme Court stated "that the Fifth Amendment guarantee against double jeopardy * * * has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. * * *."

I agree with the conclusion of the principal opinion that the Missouri General Assembly intended that two separate punishments be imposed for first degree robbery and armed criminal action. I do not agree that the holdings in *Harris* and *Vitale,* both *second prosecution* cases, are pertinent to this *multiple punishments* case. *See* State v. Neal, 514 S.W.2d 544, 550, 551 (Mo. banc 1974) (Donnelly, C. J. concurring). *See also* Rules 23.05 and 24.07.

The essential question is: should this Court apply the holdings of *Harris* and *Vitale,* both *second prosecution* cases, in this *multiple punishments* case when we know that the United States Supreme Court declined the opportunity to apply the *Harris* holding in Simpson v. United States, 435 U.S. 6, 12 (1978), also a *multiple punishments* case? I think not. In Oregon v. Hass, 420 U.S. 714, 719 (1975), the Court stated that "a State may not impose * * * greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *See also* North Carolina v. Butler, 441 U.S. 369, 376 (1979).

In my view, the logic of *Whalen* is that the *multiple punishments* proscription of *Pearce* is satisfied if the *multiple punishments* in this case were intended and authorized by the General Assembly—to hold otherwise is to make the mandate of May 27, 1980, inscrutable.

I respectfully dissent.

Robert T. Donnelly, Judge

IN THE

SUPREME COURT OF MISSOURI
EN BANC

WILLIAM SCOTT SOURS, *Appellant,* vs. STATE OF MISSOURI, *Respondent.*	**No. 61458**

DISSENTING OPINION

INTRODUCTION

I respectfully dissent. The majority's mechanical treatment of *Blockburger* v. *United States,* 284 U.S. 299 (1932), "same offense" test as substantive double jeopardy doctrine is in my view a misapplication of that test and an exaltation of form over substance. The principal opinion decides the double jeopardy clause forbids conviction and punishment in a *single prosecution* for armed criminal action and robbery under *Blockburger.* The majority does so against a tapestry of dicta woven largely from *successive prosecution* cases and by skillful conversion of the canon for "statutory construction" prescribed by *Blockburger,* into a rigid doctrine of constitutional right. The Supreme Court's mandate that on reconsideration we be guided by *Whalen v. United States,* ____ U.S. ____, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), neither so requires nor permits. In this regard the present effort is little more than a recasting of our original opinion vacated by the Court.

William Scott Sours was charged with robbery first degree by means of a dangerous and deadly weapon (§ 560.120, RSMo 1969 and § 560.135, RSMo Supp. 1975) and armed criminal action (§ 559.225, RSMo Supp. 1976) for participating in an armed robbery of a Mr. Quick Store in Jasper County. On October 5, 1977, Sours pled guilty to both charges and on January 5, 1978, was sentenced to five years imprisonment on the robbery conviction and three years imprisonment on the armed criminal action conviction, the sentences to run consecutively. See *Sours v. State,* 593 S.W.2d 208, 209-210 (Mo. banc 1980) (vacated ___ U.S. ___, 64 L.Ed.2d 820 (1980)).

It should be noted at the outset that the majority fails to address the important question of whether Sours' guilty plea constituted "a break in the chain of events" so as to preclude litigation of the double jeopardy issue in this post-conviction Rule 27.26 proceeding. See *Tollett v. Henderson,* 411 U.S. 258, 267 (1973); *Francis v. Henderson,* 425 U.S. 536, 541-542 (1976); *Wainwright v. Sykes,* 433 U.S. 72, 86-87 (1977). c.f. *Jeffers v. United States,* 432 U.S. 137, 152 (1977). Recently in *Weir v. State,* 589 S.W.2d 256 (Mo. banc 1979), this Court questioned the cognizability of a claim of double jeopardy in a Rule 27.26 proceeding following defendant's failure to raise the objection at the trial level. The majority fails to consider the rule announced by *Weir,* at 258:

> [I]t is now settled by numerous decisions in both the federal and state systems that where there is a deliberate bypass, whether for strategic, tactical, or other reasons, of orderly state procedure, a movant is precluded from raising a constitutional issue on a post conviction motion.

Instead of eagerly seizing the constitutional issue, we should remand for a determination by the sentencing court whether

Sours by pleading guilty has deliberately by-passed orderly state procedures[1] and only after a determination that he has not, should we address the far reaching federal constitutional question.

Turning to the constitutional issue, it was the framers' intent[2] that the Fifth Amendment embody the common law's double jeopardy protection against a defendant's *reprosecution* following conviction or acquittal upon a criminal charge.[3] See *Brown v. Ohio,* 432 U.S. 161, 165 (1977); *United States v. Wilson,* 420 U.S. 332, 340-342 (1975). James Madison tendered the original draft of the Fifth Amendment,[4] later amended to its present form, midst concern that a defendant's right to new trial not be abridged by a conviction erroneously obtained. See *Wilson, id.* citing I Annals of Congress 753 (1789). At the time of adoption the limited number of common law felonies, e.g., rape, robbery, murder, arson and burglary allowed for ready application and more certain protection for criminal defendants under the double jeopardy clause. To-

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[1]The "deliberate bypass" standard employed by our courts in determining whether constitutional issues improperly preserved at trial may be raised in post-conviction proceedings is similar to the "cause and prejudice" standard employed in the federal system for making determination in habeas proceedings. *Wainwright v. Sykes,* 433 U.S. 72, 95n.1 (1977) (Stevens, J., concurring).

[2]For a discussion of the historical development of the concept of double jeopardy see *Bartkus v. Illinois,* 359 U.S. 121, 151-155 (1959) (dissenting opinion of Justice Black).

[3]At common law double jeopardy was in the nature of a plea of abatement. The technical plea was either autrefoits acquit or autrefoits convict. See 2 Hawkins, Pleas of the Crown, 522-537 (6th. ed. 1777). Either plea was an absolute bar to a *subsequent* prosecution as "the party ought not to be brought twice into danger of his life for the same crime." *Id.* at 534.

[4]The original proposal would have protected a defendant from "more than one punishment or one trial for the same offense . . . " *United States v. Wilson,* 420 U.S. 332, 341 (1975), citing I Annals of Congress 434 (1789).

day, given the proliferation of complex statutory crimes, it is recognized that the doctrine's original scope cannot provide complete and certain answers in many cases. Nevertheless in the constitutional construction process, we are guided by the purposes and policies underlying the constitutional protections afforded by the framers and those who ratified our Bill of Rights.

The fountainhead of that aspect of double jeopardy jurisprudence described as the double punishment doctrine appears to be *Ex parte Lange,* 85 U.S. (18 Wall.) 163 (1873). There the sentencing court exceeded the legislative authorization for punishment of a statutory crime. Defendant was convicted of stealing post office property for which the statutes provided as punishment, imprisonment for not more than one year *or* a fine of $10 to $200. The court however sentenced Lange to one year's imprisonment *and* a fine of $200. It was in that context of the trial court having exceeded its statutory authority that the double punishment doctrine had its origins. On review, the Court was concerned with the trial court having exceeded the legislative authorization *not* the legislature's constitutional authority to proscribe certain acts as crimes and prescribe punishment therefore. The Court at 176 stated:

> We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments *to which alone the law subjected him,* the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. (Emphasis added.)

Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), which guides us here, emphasized that the decision in terms of "double punishment" turns

on the legislative intent, stating that "the *dispositive* question, therefore, is whether Congress did so provide." 100 S.Ct. 1432 at 1436, 63 L.Ed.2d at 722.

The double punishment doctrine does not constitute a substantive limitation on the legislature's power to define and punish crimes. See *Whalen v. United States,* ____ U.S. ____, 100 S.Ct. 1432, 1440, 63 L.Ed.2d 715, 726 (1980) (concurring opinion of White, J.); ____ U.S. ____, 100 S.Ct. 1432, 1440, 63 L.Ed.2d 715, 726 (concurring opinion of Blackmun, J.) Westen and Drubel, Towards A General Theory of Double Jeopardy, Sup. Ct. Rev. 81, 112-115 (1978). See also Note "Twice in Jeopardy" 75 Yale L. J. 262, 311-313 (1965). The Court in *Whalen* addressed the multiple punishment issue in terms of whether the judicial action had exceeded the legislative authorization. After a discussion of *Lange,* which as noted above can best be described as a legislative authorization case, the Court held, "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing conservative sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principal that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Whalen,* ____ U.S. ____, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715, 722 (1980).

The reason for this conclusion seems self apparent. To say that the legislature can punish crime X by life imprisonment but that it cannot define certain acts as crime X^1 punishable by five years to life and crime X^2 punishable by three years to life respectively, employs an intellectual artifice providing the criminal defendant little or no additional protection. The majority holds that

under the then applicable statutes a defendant could be convicted of armed robbery punishable by five years to life or of armed criminal action and sentenced to three years to life,[5] but could not be convicted of both in the same proceeding and if so convicted the armed criminal

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[5]Section 560.135, RSMo 1969, provided that a person convicted of robbery in the first degree by means of a dangerous and deadly weapon could be sentenced to death or imprisonment ranging from a minimum of 5 years to life. Those convicted of robbery in the first degree could be sentenced only to imprisonment ranging from a minimum of 5 years to life. *Id.* Subsequently in 1975 the legislature amended the statute and provided that the punishment for both robbery in the first degree and robbery in the first degree by means of a dangerous and deadly weapon would be imprisonment ranging from a minimum of 5 years to a life term. § 560.135, RSMo Supp. 1975.

Section 559.225, RSMo Supp. 1976 provides:

> 1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.
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> 2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.
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> 3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the

(Continued on next page)

action conviction must be vacated. (One might ask, why the armed criminal action conviction?) The principal opinion skirts the Double Jeopardy Clause's historical purpose to protect the defendant from harassment, relitigation, and judicial usurpation of the legislative authority to punish. See Note, Twice in Jeopardy, 75 Yale L.J. 262, 266-267 (1965). Instead the majority seeks to transform the provision protecting against double punishment into a diluted analogue of the Eighth Amendment without measurably enhancing the defendant's protections as shown above.[6] Though the Eighth Amendment remains a vital and essential safeguard against excessive punishment by the legislature (see *Coker v. Georgia,* 433 U.S. 584, 592 (1977); *State v. Higgins,* 592 S.W.2d 151 (Mo. banc 1979), appeal dismissed ____ U.S. ____, 100 S.Ct. 1825 (1980), redesigning the Fifth Amendment to serve the purpose filled by

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Footnote continued

division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

[6]It is true that conviction of both robbery in the first degree and armed criminal action will affect a prisoner's eligibility for parole. See Rules and Regulations Governing the Granting of Paroles, Conditional Releases, and Related Procedures, Missouri Board of Probation and Parole, pp. 8-10 (1979). However such delay in parole eligibility would be present upon a conviction for armed criminal action alone. *Id.*, § 559.225, RSMo Supp. 1976. The mere fact that multiple convictions occur and consecutive sentences are imposed does not alter eligibility for parole in any way. Rules and Regulations Governing the Granting of Paroles, Conditional Releases, and Related Procedures, Missouri Board of Probation and Parole, pp. 11-12 (1979).

the Eighth serves no legitimate function[7] and violates the canons of orderly constitutional construction.

The only apparent justification for the majority's manipulation of the double punishment doctrines is to guard against prosecutorial and judicial arbitrariness. A constitutional issue of some dimension would be presented if the statutory pattern allowed random and capricious results in which some defendants were convicted of one of the constituent crimes and other convicted of both without any ascertainable justification. Such is not the case under our statutes. The legislature, 18 U.S.C. 848 (conducting an enterprise to distribute heroin), and held that a defendant convicted of 846 in a prior proceeding had no double jeopardy claim in respect to a later 848 prosecution because the defendant had earlier successfully moved to sever the charges. A fortiori, it may be said that Jeffers, who was tried and convicted in two proceedings for two offenses, one of which the Court assumed to be a lesser included offense, could have been tried for both in a single proceeding and so it is with Sours.

The majority's reliance on *Harris v. Oklahoma,* 433 U.S. 682 (1977) and *Brown v. Ohio,* 432 U.S. 161 (1977), is misplaced. First, *Harris* and *Brown* were successive prosecution cases involving the serious risks of vexation and harassment to criminal defendants attendant in multiple prosecutions. Further, the precise issue presented

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[7]This Court has held that punishment enhancement schemes which impose additional liability upon conviction of a crime if certain facts are shown to exist (i.e., previous convictions) are not violative of double jeopardy. See § 556.280, RSMo 1969 (repealed); § 558.016, RSMo 1978; *State v. Johnstone,* 335 S.W.2d 199, 204 (Mo. 1960), *cert. denied,* 364 U.S. 842 (1960). It is difficult to perceive a functional difference between a sentence enhancement scheme and the "armed criminal action–first degree robbery consecutive punishment plan" the majority now holds is forbidden by the Fifth Amendment to the United States Constitution.

here was specifically reserved by the Court in *Simpson v. United States,* 435 U.S. 6, 11-12 (1978), decided some eight months following *Harris,* which teaches that *Harris* was not, as asserted by the majority, dispositive of the issue here. I might add that the mandate of the Court in *Sours* does not direct us to decide this case "in the light of *Harris v. Oklahoma.*" Harris merely held that a defendant's conviction of felony murder based on a killing in the course of an armed robbery barred a *subsequent* prosecution against that same defendant for robbery. *Harris v. Oklahoma,* 433 U.S. 682 (1977). *Brown* decided only that once a defendant was convicted of misdemeanor joyriding, the State was barred by double jeopardy from convicting the defendant of the greater included offense of felony auto theft in a *subsequent* prosecution. "[T]he Fifth Amendment forbids *successive* prosecution and cumulative punishment for a greater and lesser included offense," (Emphasis added), *Brown v. Ohio,* 432 U.S. 161 at 169 (1977). Indeed the Court in *Brown* reiterated at 165 the as recognized by the majority, clearly intended that a person committing a felony with a firearm be convicted and punished for both the underlying felony and armed criminal action. "Any person who commits any felony under the laws of this State by, with, or through the use, assistance, or aid of a dangerous or deadly weapon *is also guilty of the crime of armed criminal action* . . . . The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon." Section 559.225, RSMo Supp. 1976. The uncertainty as to legislative intent in *Whalen* is not present here. Further, it was noted there that "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." *Whalen,* ____

U.S. ____, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715, 722 (1980). The penalties imposed here were explicitly provided by the legislature. The problem of ambiguity for which the rule of lenity provides an important safeguard against prosecutorial and judicial arbitrariness, simply is not present. In sum, when the legislative intent that an act be punished as two crimes is clear, the potential for arbitrariness by prosecutors and judges is de minimus. As a result, no issue of constitutional dimension arises under the Fifth Amendment by the operation of our Missouri armed criminal action statute.

An examination of earlier United States Supreme Court opinions and recent summary actions by that Court points up the validity of our Missouri armed criminal action scheme under which a person who commits a felony with a dangerous and deadly weapon may be found guilty of two offenses, armed criminal action and the underlying felony. In *Jeffers v. United States,* 432 U.S. 137, 147-150 (1977), the Court assumed arguendo, that 18 U.S.C. 846 (conspiracy to distribute heroin) was a lesser included offense of freedom of the legislature to proscribe criminal conduct and prescribe punishment.

> [T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial. *Brown v. Ohio,* 432 U.S. 161, 165.

Not only does the majority disregard the Court's consistent concern in decisions from *Lange* to *Whalen* with

the scope of legislative authorization as to double punishment claims, it also fails to recognize that the defendant's interest in finality, the core value furthered by the Double Jeopardy Clause, is not implicated in unitary prosecution cases. The prime consideration in this unitary prosecution case is the legislative objective of deterring violent offenders by increasing penalties for felonies committed with a weapon.[8] The principal opinion effectively thwarts that objective.

The majority fails to discuss the recent action of the Court on a nearly identical issue dismissing an appeal for want of a substantial federal question. The Court dismissed the appeal from a Michigan Supreme Court decision holding that consecutive punishment does not violate the federal constitution's Fifth Amendment. *Wayne County Prosecutor v. Recorder's Court Judge* and *People v. Brintley,* 280 N.W.2d 793 (Mich. 1979) appeal dismissed sub nom *Brintley v. Michigan,* 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979). There, the Michigan Supreme Court addressed the constitutionality of convictions under a Michigan statute (similar to the Missouri armed criminal action statute) providing that a felony committed by a person with a firearm constituted an additional offense, for which one convicted was to be punished consecutively to the sentence imposed on the underlying felony. Defendant contended his convictions violated rights protected by

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[8]At the time of the enactment of the armed criminal action statute law enforcement authorities intiated a publicity campaign warning "use a gun, go to prison." Whether the armed criminal action statute sub judice furthered these important goals is a matter for legislative determination. Fixing punishment for crimes defined by statute is the province of the legislature, not the courts. *State* v. *Alexander,* 315 Mo. 199, 285 S.W. 984, 985 (1926); *State v. Higgins,* 592 S.W.2d 151, (Mo. banc 1979), appeal dismissed, ____ U.S. ____, 100 S. Ct 1825 (1980).

the Fifth Amendment. See MCLA 750.227(b);[9] *Id.* at 794. The Michigan Court, in a persuasive and comprehensive opinion dealing with the precise question here presented, held that by enacting the felony-firearm statute the legislature created a separate crime distinct from the underlying felony and intended that consecutive punishments be imposed. *Brintley,* 280 N.W.2d 793 at 795-796. In one of the cases involved in that consolidated appeal, *People v. Brintley,* the court firmly concluded that conviction of both felony firearm and armed robbery offenses (described as the "same offense" under the majority opinion here) was not violative of the federal constitution's protection against double jeopardy. *Id.* at 799-800. Of prime importance here, the United States Supreme Court dismissed the appeal from that judgment "for want of substantial federal question." 444 U.S. 948. The Court's refusal to disturb the conclusion of the Michigan Supreme Court that conviction of both felony-firearm and armed robbery in

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[9]MCLA 750.227(b) provides:

(1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).

As is readily apparent from the face of the statute, it is indistinguishable in all important details from the Missouri armed criminal action statute. See n.8 *supra.*

a single proceeding did not violate the Fifth Amendment's prescription has precedential value as a disposition on the merits. See *Hicks v. Miranda,* 422 U.S. 332, 344-345 (1975). We are bound to follow that summary decision under the command of the Supremacy Clause as to all federal questions. Art. VI, § 2, United States Constitution. As recently explained by the United States Supreme Court, "[s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley,* 432 U.S. 173 at 176 (1977). Here the majority has reached a decision diametrically opposed to the conclusion reached in *Brintley* and seems unconcerned that the appeal was dismissed by the Supreme Court for want of a substantial federal question. In the jurisdictional statement to the appeal filed by Brintley, a claim was made that conviction of both felony-firearm and armed robbery violated the double jeopardy doctrine.[10] The Supreme Court necessarily

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[10]In the jurisdictional statement filed on October 15, 1979, in *Brintley v. Michigan,* No. 79-5506, appeal dismissed, 444 U.S. 948 (1980), Brintley's counsel argued that conviction and consecutive punishment in one proceeding for armed robbery and felony-firearm under MCLA 750.227b constituted double jeopardy as multiple punishment. The argument headings contained in the statement of jurisdiction spell out this claim. "I. THE DOUBLE JEOPARDY CLAUSE IS A SUBSTANTIVE LIMITATION ON THE MICHIGAN LEGISLATURE." Appellant's Statement of Jurisdiction, page 8. "II. THE VIOLATION OF § 750.227b ALLEGED IN COUNT II OF EACH INFORMATION REQUIRED PROOF OF ALL ELEMENTS CONTAINED IN COUNT I, AND THUS THE OFFENSES WERE THE SAME FOR DOUBLE JEOPARDY PURPOSES." Appellant's Statement of Jurisdiction, page 11. "III. CONVICTION UNDER § 750.227b REQUIRES PROOF OF A SPECIFIC FELONY." Appellant's Statement of Jurisdiction, page 12.

(Continued on next page)

rejected that claim when it dismissed the appeal. Yet the majority ignores or overlooks *Brintley* and decides the same issue on federal constitutional grounds. While such action is defensible in the context of adjudication of state constitutional provisions, it does not square with the command of the Supremacy Clause and the role of state courts in the federal system when federal questions are presented.

Neither do subsequent doctrinal developments justify the majority's disregard of the Court's summary action in *Brintley*. As previously noted in *Whalen*, the Court's most recent pronouncement, the constitutional issue was discussed in terms of whether the punishment imposed exceeds the legislative authorization. Having determined Congress did not intend consecutive punishments by enacting D.C. Code 23-112, the Court stated, "Congress is clearly free to fashion exceptions to the rule it chose to enact in § 23-112." *Whalen*, ____ U.S. ____, 100 S.Ct. 1432, 1439, 63 L.Ed.2d 715, 725 (1980). We might add, if the Congress has such latitude, why not the Missouri General Assembly?

I conclude the majority opinion confers upon courts a role neither contemplated by those who ratified the Fifth Amendment nor supported by subsequent Supreme Court decisions interpreting it. As Justice Frankfurther analyzed

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Footnote continued

"IV. MR. BRINTLEY'S SENTENCE HAS BEEN TWICE AUGMENTED UNDER TWO STATUTES WHICH ARE THE SAME FOR DOUBLE JEOPARDY PURPOSES." Appellant's Statement of Jurisdiction, page 15. "V. THE DOUBLE JEOPARDY CLAUSE BARS MULTIPLE CONVICTIONS ARISING FROM A SINGLE ACT OCCURRING AT ONE PLACE, AT ONE TIME, AND FOR ONE PURPOSE." Appellant's Statement of Jurisdiction, page 16. The Supreme Court necessarily rejected all these contentions in respect to MCLA 750.227b virtually identical in its consecutive punishment scheme to § 559.225, RSMo Supp. 1976. Such rejection is of precedential value in this case and we are bound to follow it. *Hicks v. Miranda*, 422 U.S. 332, 344, 345 (1975).

a similar claim, "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy." Citations omitted. *Gore v. United States,* 357 U.S. 386 at 393 (1958). I submit the majority opinion in the name of double punishment doctrine invades the power of the legislature to define crimes and prescribe punishment. Accordingly, I must dissent.

ALBERT L. RENDLEN, Judge

APPENDIX B

IN THE

SUPREME COURT OF MISSOURI
EN BANC

Reported at: 593 SW2d 208

WILLIAM SCOTT SOURS, *Appellant,* vs. STATE OF MISSOURI, *Respondent.*	**No. 61458**

January, 15, 1980.

Rehearing Denied February 11, 1980

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable Ben F. Pyle, Judge

This is an appeal from the denial after hearing of appellant's Rule 27.26 motion to set aside convictions entered October 4, 1977. Appellant seeks relief from convictions based on pleas of guilty to an information in two counts charging robbery first degree by means of a dangerous and deadly weapon, § 560.120, RSMo 1969 and § 560.135, RSMo Supp. 1975 (now § 569.020.1(2) RSMo 1978), and armed criminal action, § 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978). Appellant contends that convic-

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tions for both crimes based on one incident violates his constitutional right against being twice placed in jeopardy. Jurisdiction is in this Court because the case involves the constitutionality of a statute of this state. Mo. Const. art. V, § 3.

On May 14, 1977, appellant accompanied Charles Mahan into a fast-food store named Mr. Quick, where Mahan, armed with a pistol, took $949.06 from the store's clerk, Kendall Carnes. Mahan was charged with armed robbery and pleaded guilty, receiving a sentence of five years in the Department of Corrections. In an information filed June 20, 1977, appellant was charged with both armed robbery and armed criminal action. On October 5, 1977, appellant pleaded guilty to both counts. On January 5, 1978, appellant was sentenced to five years imprisonment on the robbery conviction and three years imprisonment on the armed criminal action conviction, the sentences to run consecutively.

On September 21, 1978, appellant filed a motion to vacate the convictions and sentences, alleging that his attorney rendered ineffective assistance; that the plea was coerced by the threat of the use of allegedly false testimony to be given by Charles Mahan; and that the conviction for both first degree armed robbery and armed criminal action placed him in double jeopardy. On April 3, 1979, appellant by appointed counsel filed an amended motion alleging that the conviction for both offenses violated appellant's constitutional right to be free from double jeopardy; that the consecutive sentences should be vacated because it is not mandatory for a sentence under the armed criminal action statute to run consecutively with the sentence for the underlying felony; that the trial court did not properly advise the appellant as to the range of punishment for the crimes with which he was charged; that the trial court failed to obtain an adequate factual basis before ac-

cepting appellant's guilty pleas; and, that the sequence in which the appellant was to serve the two sentences should be reversed so as to permit him his statutory opportunity to be released on parole.

In a hearing held April 16, 1979, appellant and his attorney withdrew all of the allegations contained in the amended motion except the claim based on double jeopardy and that based on the court's alleged erroneous assumption that the armed criminal action statute required consecutive sentencing. In this hearing, appellant and respondent stipulated that both of the charges filed against appellant arose from the same occurrence, and that there was only one robbery involved.

On April 19, 1979, the court sustained the part of the motion that was based on the court's erroneous assumption that it could not make the armed criminal action sentence run concurrently with the robbery sentence. As a correction of the sentence entered January 5, 1978, the court resentenced appellant to five years on the robbery charge and three years on the armed criminal action charge, the sentences to run concurrently. Also on April 19, 1979, the court denied the part of the motion that was based on the claim of double jeopardy. On June 5, 1979, appellant filed with the circuit court his notice of appeal to this Court.

We are not here presented with a case involving multiple prosecutions for the same offense. The only question presented in this appeal is whether it constitutes double jeopardy to charge and convict a defendant in a single prosecution with both first degree robbery by means of a dangerous and deadly weapon and armed criminal action arising out of the same incident. We find that armed criminal action and the underlying felony, in this case robbery first degree, are the "same offense" for double jeopardy purposes. We reverse appellant's conviction for armed

criminal action and affirm appellant's conviction for robbery. To the extent that our decisions in State v. Valentine, 584 S.W.2d 92 (Mo. banc 1979) and State v. Treadway, 558 S.W.2d 646 (Mo. banc 1977), *cert. denied,* 439 U.S. 838 (1978) are inconsistent with this opinion, we disapprove those cases.

Analysis begins with the double jeopardy provision in the Missouri Constitution. Mo. Const. art. I, § 19 prohibits the state from placing a person "again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury." This language has been interpreted to apply "only where there has been an acquittal of the defendant by a jury." Murray v. State, 475 S.W.2d 67, 70 (Mo. 1972); Kansas City v. Henderson, 468 S.W.2d 48, 52 (Mo. 1971), *cert. denied,* 404 U.S. 1004 (1971). Since the convictions from which appellant seeks relief were obtained in a single prosecution, Mo. Const. art. I, § 19 does not apply in this case.

While the double jeopardy provision in the Missouri Constitution does not resolve the issue presented, Benton v. Maryland, 395 U.S. 784, 793-96 (1969) has held that the double jeopardy clause of the fifth amendment to the United States Constitution does apply to the states through the fourteenth amendment, because it is "fundamental to the American scheme of justice." The fifth amendment provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This privision prohibits not only multiple prosecutions but also multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969), decided the same day as *Benton,* stated that the guarantee against double jeopardy

> has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against

> a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Id. at 717; Brown v. Ohio, 432 U.S. 161, 165 (1977); State v. Parsons, 513 S.W.2d 430, 438 (Mo. 1974). The Court in *Pearce* quoted at length from "the landmark case" of Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874) as providing "the controlling constitutional principle." 395 U.S. at 717. The protection against multiple punishments was established in *Lange* in the following language:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction, a second punishment inflicted?
>
> The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.

85 U.S. (18 Wall.) at 173. The principle that the double jeopardy clause prohibits double punishments for the same

offense has been reaffirmed in subsequent decisions of the United States Supreme Court in Simpson v. United States, 435 U.S. 6, 11 n. 5 (1978); Brown v. Ohio, 432 U.S. 161, 165 (1977); Jeffers v. United States, 432 U.S. 137 (1977) (plurality opinion, at 155; opinion of Stevens, J., concurring in part and dissenting in part, at 159 n. 5); and Iannelli v. United States, 420 U.S. 770, 786 n. 18 (1975).

One more than one occasion, this Court has held that "where in law and in fact there is only one crime," the protection of the double jeopardy clause against multiple punishments for the same offense forbids convicting and punishing a defendant for two offenses in one proceeding. State v. Parsons, 513 S.W.2d 430 (Mo. 1974). *Accord,* State v. Neal, 514 S.W.2d 544 (Mo. banc 1974). *Cf.* State v. Richardson, 460 S.W.2d 537 (Mo. banc 1970).

In State v. Parsons, 513 S.W.2d 430 (Mo. 1974), the defendant was convicted in one proceeding of first degree murder of his wife by bombing (Count I), and of putting a person in danger of bodily injury or death by wilfully and maliciously exploding a bomb (Count II), a violation of § 564.560, RSMo 1969. The defendant was sentenced to life imprisonment for the murder and to 99 years' imprisonment for the bombing. The Court reversed on double jeopardy grounds the defendant's conviction of the separate charge of bombing. The Court stated:

> The bombing described in each count was the identical, self-same bombing. The person charged in Count I to have been killed by the bombing is the identical, self-same person whose life was charged to have been endangered by bombing, in Count II. The bombing which endangered the victim's life was one and the same, inseparable and indivisible with the bombing which took her life. The victim's death was instantaneous and simultaneous with the explosion of the

bomb. The bomb was the death weapon. The necessary act toward the commission of the murder was the bombing. Likewise, the necessary act toward the commission of the bombing was the identical act necessary to constitute the crime of murder. The bombing was an incident included in the crime of murder as charged, but the state has obtained a conviction not only of the crime of murder by bombing but also a conviction for the incident of bombing. Absent a waiver . . . a person cannot be "tried and convicted for a crime which has various incidents included in it," and *at the same time* be tried for one of those incidents, "without being twice put in jeopardy for the same offence." In re Nielsen, 131 U.S. 176, 188, 9 S.Ct. 672, 676, 33 L.Ed. 118 (1889). There was but one crime. The state cannot split a single crime and prosecute it in separate parts. State v. Toombs, 326 Mo. 981, 34 S.W.2d 61, 64 (1930); State v. Whitley, 382 S.W.2d 665 (Mo. 1964); State v. Richardson, 460 S.W.2d 537, 539 [1] (Mo. banc 1970). If there is but a single act of force proved as an incidental means of committing a murder that act of force may not also be charged as a separate crime. In that situation only one punishment may be had.

513 S.W.2d at 437-38. (Emphasis added.) In State v. Neal, 514 S.W.2d 544 (Mo. banc 1974), the defendant was charged in one proceeding of robbery first degree by means of a dangerous and deadly weapon of Johnnie Walton (Count I) and with assault with intent to kill with malice aforethought of William Cordes (Count II) and of Johnnie Walton (Count III). The defendant was convicted and sentenced under all three counts. The Court reversed the conviction and sentence under Count III, stating:

First, the robbery in this case of Cordes Hardware by taking money from the custody of Johnnie

> Walton, Count I, was the result of the assault committed upon Johnnie Walton and it was the identical assault also charged in Count III. To thus split the single crime of robbery and prosecute it in Count I and a second time in Count III as an assault violated the rule against double jeopardy. State v. Richardson, 460 S.W.2d 537 (Mo. banc 1970). Accordingly, Count III was improperly submitted; and the judgment, insofar as it convicts defendant and sentences him to five years' imprisonment for the offense there charged, must, therefore, be reversed.

514 S.W.2d at 548. Thus, it is well-established in Missouri that if two statutory crimes constitute the "same offense," the protection against multiple punishment embodied in the double jeopardy clause prohibits convicting a defendant of both crimes in a single proceeding.[1]

Because the double jeopardy clause prohibits multiple punishments for the same offense, the criterion for distinguishing one offense from another for double jeopardy purposes is crucial to resolution of this case. Conviction and punishment for two distinct offenses arising out of the

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[1]In State v. Richardson, 460 S.W.2d 537 (Mo. banc 1970), the defendant pleaded guilty in one proceeding to attempted robbery by means of a deadly weapon, and was found guilty by a jury in a subsequent proceeding of assault with intent to maim without malice. Both prosecutions were based on a single incident. The sentence for the attempted robbery was ten years; the sentence for the assault was three years. In reversing the second conviction, the Court relied on the rule that "'[i]f there is but a single act of force proved as an essential element of the crime of robbery, then such act of force cannot be availed of as constituting the separate crime of assault.'" The Court cited Wilkerson v. State, 41 Ala.App. 265, 130 S.2d 348, 349 (1961); State v. Miller, 129 C.A.2d 305, 276 P.2d 846, 848 (1954); People v. Logan, 41 Cal.2d 279, 290, 260 P.2d 20 (1953); State v. Wines, 47 N.J. Super. 235, 135 A.2d 543, 544 (1957). In each of these cases, the defendant was charged with multiple offenses in a single proceeding, and it was held that only one conviction and punishment could be had.

same transaction does not offend the federal double jeopardy provision. Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1932). *Cf.*, State v. Moton, 476 S.W.2d 785, 790 (Mo. 1972); State v. Whitley, 382 S.W.2d 665, 668 (Mo. 1964).

The test for determining whether two offenses are "the same" for double jeopardy purposes was stated in Blockburger v. United States, 284 U.S. 299, 304 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Gavieres v. United States, 220 U.S. 338, 342, and authorities cited.

The *Blockburger* test has been reaffirmed on numerous occasions, most recently in Simpson v. United States, 435 U.S. 6, 11 (1978); Brown v. Ohio, 432 U.S. 161, 166 (1977); Jeffers v. United States, 432 U.S. 137 (1977) (plurality opinion, at 150; opinion of White, J., concurring in part and dissenting in part, at 158); Iannelli v. United States, 420 U.S. 770, 785 n. 17 (1975); Gore v. United States, 357 U.S. 386, 388 (1958). The word "each" is essential to a proper application of the *Blockburger* criterion. If statute A requires proof of a fact not required by statute B, but statute B does not require proof of any fact not required by statute A, then the offense defined by statute B is a lesser included offense of that defined by statute A. The greater offense is the "same offense" as the lesser included offense for double jeopardy purposes. Brown v. Ohio, 432 U.S. 161, 167 (1977); Jeffers v. United States, 432 U.S. 137, 146, 150, 158 (1977); Harris v. Oklahoma, 433 U.S. 682, 682 (1977). *See also* United States v. Stavros, 597 F.2d 108, 112 (7th Cir. 1979). The double jeopardy

clause prohibits successive prosecutions for both the lesser included offense and the greater offense, and it prohibits the imposition of a separate sentence for both the lesser included offense and the greater offense.

Comparison of the two statutes under which the defendant in the instant case was convicted is necessary for application of the *Blockburger* test. In this case, the defendant was convicted of robbery first degree, and armed robbery, § 560.120, RSMo 1969 and § 560.135, RSMo Supp. 1975, and of armed criminal action, § 559.225, RSMo Supp. 1976.

Section 560.120, RSMo 1969 provided:

> Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent, by violence to the person of such wife, servant, clerk or agent, or by putting him or or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo Supp. 1975 provided:

> Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five or less than three years; every person convicted of robbery in the

third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

Section 559.225.1, RSMo Supp. 1976 provided:

> Except as provided in subsection 4 of this section any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

As will be seen, the reference to "any felony" in § 559.225.1, RSMo Supp. 1976 mandates the conclusion that the offense of armed criminal action includes the underlying felony. Since the double jeopardy clause prohibits the imposition of punishments both for the lesser included offense and for the greater offense, the appellant's conviction for armed criminal action must be reversed.

The United States Supreme Court has never decided whether robbery and the offense of committing a felony by means of a dangerous and deadly weapon constitute the "same offense" for double jeopardy purposes. The Court expressly declined to rule on this issue in the recent case of Simpson v. United States, 435 U.S. 6 (1978). In *Simpson,* the defendants were convicted in two separate jury trials of two bank robberies committed in Middlesboro, Kentucky, one on September 8, 1975, and the second

on November 4, 1975. For each of the two bank robberies, the defendants were convicted of violating 18 U.S.C. § 2113(d) and 18 U.S.C. § 924(c) (1970). Section 2113(d) provides for penalties for assaulting or jeopardizing the life of any person "by the use of a dangerous weapon or device" in taking or attempting to take property belonging to a bank or similar institution from another person by force and violence or by intimidation. Section 924(c) provides that whoever uses a firearm to commit any felony or carries a firearm unlawfully during the commission of any felony "shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years." The District Court rejected the defendants' argument that sentencing under both sections constituted multiple punishment forbidden by the double jeopardy clause, and the Sixth Circuit Court of Appeals affirmed. The Supreme Court expressly declined to decide whether the two offenses were the same under the *Blockburger* test, and found it unnecessary to decide whether sentencing under both provisions was violative of the double jeopardy clause protection against multiple punishment for the same offense. 435 U.S. at 11-12. Instead, the Court analyzed the legislative history of § 924(c) and determined that "the section was intended to be unavailable to prosecutions of § 2113(d)." *Id.* at 15.

The Court held that "in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both § 2113(d) and § 924(c)." *Id.* at 16. The Court deemed it unnecessary to decide the constitutional question precisely because it found that the legislature did not intend that a defendant be charged under both sections.

Cases in which the Government is able to prove violations of two separate criminal statutes with pre-

> cisely the same factual showing, as here, raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the *Blockburger* test. That test, the Government argues, is satisfied in this case. We need not reach the issue. Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged. Jeffers v. United States, 432 U.S. 137, 155 (1977).

Id. at 11-12. The obvious implication of this analysis is that, had the legislature clearly intended that a person be prosecuted under both sections 924(c) and 2113(d), the question whether the two sections define the "same offense" for double jeopardy purposes would have to be addressed. *See* United States v. Makres, 598 F.2d 1072, 1078 (7th Cir. 1979); United States v. Dorsey, 591 F.2d 922, 940 (D.C. Cir. 1978); O'Clair v. United States, 470 F.2d 1199, 1203 (1st Cir. 1972); Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793, 805, 806-07 (1979) (Kavanagh, J., dissenting, and Levin, J., dissenting); People v. Hughes, 85 Mich.App. 674, 272 N.W.2d 567, 572-74 (1978) (Walsh, J., dissenting). The inference that the double jeopardy clause prevents giving effect to the legislative intent to twice punish the "same offense" is strengthened by consideration of Jeffers v. United States, 432 U.S. 137 (1977).

In *Jeffers,* the defendant was charged with violations of 21 U.S.C. § 848 (1970) conducting a continuing criminal enterprise to violate the federal drug statutes, and was charged along with nine codefendants with violations of 21 U.S.C. § 846 (1970) conspiracy to distribute heroin

and cocaine in violation of 21 U.S.C. § 841(c)(1)(1970). The government sought to consolidate the two charges for trial, but the defendants objected and the court denied the motion to consolidate. Jeffers and six codefendants were found guilty of the conspiracy charge. Jeffers then moved to dismiss the continuing criminal enterprise charge on double jeopardy grounds since all of the elements of the conspiracy offense were included in the continuing criminal enterprise offense. The Seventh Circuit Court of Appeals agreed that the offense defined by § 846 was a lesser included offense of that defined by § 848, but held that in cases of complex statutory crimes greater and lesser offenses could be separately punished if Congress so intended, relying on an interpretation of Iannelli v. United States, 420 U.S. 770 (1970). 532 F.2d 1101 (7th Cir. 1976). The Supreme Court rejected the Seventh Circuit's interpretation of *Iannelli* that a second trial on the "same offense" was permissible under the double jeopardy clause if Congress intended separate punishment. The plurality opinion written by Justice Blackmun, joined by Justices Burger, Powell, and Rehnquist, determined that even assuming, without deciding, that § 846 defines an offense that is included in the offense defined in § 848, Congress did not intend to allow cumulative punishment for violations of §§ 846 and 848. The Court held that Jeffers could be prosecuted separately for the lesser included offense because he had opposed consolidation and asked for separate trials, but Jeffers' actions did not permit him to be punished twice. Accordingly, the fine imposed on the petitioner was vacated to the extent that it exceeded the statutory maximum prmitted under § 848.[2] The plurality opinion stated:

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[2]Justice White did not think that the § 846 offense was a lesser included offense of the § 848 offense, and thus concurred in the plurality opinion's affirmance of petitioner's conviction, but dissented from the

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> The critical inquiry is whether Congress intended to punish each statutory violation separately. . . . In Iannelli v. United States [420 U.S. 770 (1975)], the Court concluded that Congress did intend to punish violations of § 1955 separately from § 371 conspiracy violations. *Since the two offenses were different, there was no need to go further.* See 420 U.S., at 785-786, nn. 17-18. See also Gore v. United States, 357 U.S. 386 (1958). If some possibility exists that the two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple-punishment difficulties.

432 U.S. at 155. (Emphasis added.) Here again, the obvious implication is that where the legislature does intend to punish two statutory offenses separately, but the offenses are the "same offense" under the *Blockburger* criterion, it is necessary to "go further" to avoid violation of the double jeopardy clause protection against multiple punishment.

The General Assembly clearly intended that both § 559.225.1, RSMo Supp. 1976 (now § 571.015, RSMo 1978) and the statute defining the underlying felony be applied

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Footnote continued
plurality's action in vacating part of petitioner's fine. Justice Stevens was joined by Justices Brennan, Stewart, and Marshall, in an opinion that concurred in the judgment to the extent that it vacated the cumulative fines, but dissented from the affirmance of the conviction. Justice Stevens stated that "[i]t is quite clear . . . that petitioner has been denied his constitutional rights," and argued that one fact that "clinch[ed] the double jeopardy claim" was that "petitioner was not only twice tried, but also twice punished for the same offense." *Id.* at 159 n. 5. Justice Stevens and the three concurring justices would have reversed the subsequent conviction for the greater offense of continuing criminal enterprise. Thus, eight justices voted to vacate petitioner's sentence at last to the extent it exceeded the maximum punishment for the greater offense.

to a defendant in a prosecution arising out of a single transaction. The statute expressly provides that "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon *is also guilty* of the crime of armed criminal action . . . and shall be punished . . . . *in addition to* any punishment provided by law for the [underlying] crime." (Emphasis added.) Thus, section 560.225.1, RSMo Supp. 1976 provides for more than merely an enhanced sentence. In this respect, the armed criminal action statute is different from, and raises double jeopardy problems not raised by, punishment enhancement provisions such as those contained in § 558.016, RSMo 1978 for persistent or dangerous offenders. The armed criminal action statute calls for conviction of a second crime and for the imposition of a second sentence. Consequently, the question whether the two crimes are the "same offense" for double jeopardy purposes cannot be avoided.

In two recent cases, this Court addressed the question whether convicting and punishing a person of both robbery first degree and armed criminal action constitutes double jeopardy. State v. Valentine, 584 S.W.2d 92 (Mo. banc 1979); and State v. Treadway, 558 S.W.2d 646 (Mo. banc 1977), *cert. denied,* 439 U.S. 838 (1978). In State v. Treadway, 558 S.W.2d 646 (Mo. banc 1977), the defendant was convicted in one count of robbery first degree and in a second count of armed criminal action. The defendant moved to dismiss the armed criminal action count of the information on the ground that prosecution for both robbery first degree and armed criminal action subjected him to multiple punishments for the same offense. The motion was denied and the defendant appealed his convictions. The Court observed that Missouri follows the "separate or several offense rule" and not the "same

transaction rule," in determining whether a defendant charged with two crimes has been placed in double jeopardy. *Id.* at 651. If "each offense necessitates proof of an essential fact or element not required by the other" there is no identity of offense. *Id.;* State v. Chambers, 524 S.W.2d 826, 829 (Mo. banc 1975), *cert. denied,* 423 U.S. 1058 (1976); State v. Carter, 535 S.W.2d 537, 538 (Mo. App. 1976). *Cf.* Blockburger v. United States, 284 U.S. 299, 304 (1932). The Court held that first degree robbery and armed criminal action are not the same offense under this test. Robbery first degree does not require proof of the use of a dangerous and deadly weapon; any means of the production of fear will sustain a robbery conviction. Armed criminal action does require proof of the use of a dangerous and deadly weapon. From these considerations, the Court concluded that "[s]ince the two offenses are not the same in law, appellant's double jeopardy protection has not been abrogated." *Id.* at 652.[3] It is not clear that the analysis in *Treadway* applied both halves of the *Blockburger* test. The Court considered only whether armed criminal action included elements not in

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[3]Appellant seeks to distinguish *Treadway* on the ground that the defendant in *Treadway* was charged with robbery first degree and armed criminal action whereas Count I of the information in this case charged appellant with armed robbery, § 560.135, RSMo Supp. 1975 and robbery first degree by means of a dangerous and deadly weapon, § 560.120, RSMo 1969. This effort to distinguish *Treadway* cannot succeed. The allegation that the fear required under § 560.120, RSMo 1969 was produced by a dangerous and deadly weapon is not an element of robbery first degree and is mere surplusage. Keeny v. State, 461 S.W.2d 731, 732 (Mo. 1971); State v. Pope, 364 S.W.2d 564, 568 (Mo. 1963); State v. Vigus, 66 S.W2d 854, 857 (Mo 1933); State v. Shuls, 329 Mo. 245, 44 S.W.2d 94, 96 (1931). *Accord,* State v. Braddock, 558 S.W.2d 776, 779 (Mo.App. 1977); State v. Long, 539 S.W.2d 592, 594 (Mo.App. 1976); State v. Nelson, 532 S.W.2d 855, 856 (Mo. App. 1975). Consequently, if *Treadway's* holding that robbery first degree is not included in armed criminal action is valid, appellant's motion for postconviction relief cannot be sustained.

robbery, and did not consider whether robbery contained any elements not contained in armed criminal action.[4]

Although *Treadway* did not apply the second half of the *Blockburger* criterion for sameness of offense, cases from other jurisdictions have found that armed robbery and the use of a firearm in the commission of that felony are distinct offenses under the *Blockburger* test because robbery contains elements not necessarily included in the felony-firearm offense. State v. Saxon, 193 Neb. 283, 226 N.W.2d 765 (1975), *habeas corpus relief denied,* Kowalksi v. Parratt, 533 F.2d 1071 (8th Cir. 1976), *cert. denied,* 429 U.S. 844 (1976); Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793 (1979); Jones v. Commonwealth, 218 Va. 18, 235 S.E.2d 313 (1977). *See also,* United States v. Hearst, 412 F.Supp. 877 (N.D. Cal. 1976).[5]

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[4]*Treadway* did quote language found in Kowalski v. Parratt, 533 F.2d 1071 (8th Cir. 1976) that the "gist" of each offense was different from that of the other. *Kowalski* found that robbery and robbery with firearm were not the "same offense" because the Nebraska weapons offense could be shown by proof of "any felony" (and thus, robbery has elements not necessarily in felony-firearm). *Valentine* does not expand on the analysis used in *Treadway*. *Valentine* neither cites *Blockburger* nor attempts to state what elements of robbery are not in armed criminal action. *Valentine* merely cites *Treadway* for the claim that "each crime contained elements not found in the other." 584 S.W.2d at 96. Neither opinion analyzed the impact of Harris v. Oklahoma, 433 U.S. 682 (1977) on the proper application of the *Blockburger* criterion to the type of "felony-plus" statute involved here.

[5]Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793 (1979) reversed the dispositions given two cases by separate panels of the Michigan Court of Appeals. In one case, the defendant was convicted in a single trial of second degree murder and of a violation of Michigan's felony-firearm statute, Mich. Comp. Laws Ann. § 750.227b (Supp. 1979); in the other, the defendant was convicted in a single trial of armed robbery and felony-firearm. The court of appeals vacated the defendants' respective convictions for felony-firearm. The Michigan Supreme Court reversed the court of appeals in

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In each of these cases there is no difficulty with the claim that the felony-firearm statute includes an element not in the underlying felony, *i.e.*, the use or possession of a dangerous weapon. The central problem is whether the underlying felony has any elements which are not incorporated into the weapons offense. *Wayne County, Jones, Kowalski,* and *Hearst* each single out the distinguishing element of the particular felony involved, and stress that the weapons offense need not include that element, but may be committed by the use of a weapon in connection with *any* felony. This manner of applying the *Blockburger* test makes the weapons offense appear to be distinct from the underlying felony for double jeopardy purposes; however, such an application of the *Blockburger* test is not

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Footnote continued
each case and reinstated the convictions. The Michigan Supreme Court concluded that the felony-firearm offense was distinct from the underlying felony in each case, reasoning that the state was not required to prove the particular felony charged in order to convict the defendant of felony-firearm: "*Any proper felony* would have sufficed." 406 Mich. at ——, 280 N.W.2d at 799. (Emphasis supplied.) Similarly, in Jones v. Commonwealth, 218 Va. 18, 235 S.E.2d 313 (1977), the Virginia Supreme Court affirmed the defendant's convictions of robbery and of the use of a firearm in the commission of a felony, a violation of Va. Code § 18.2-53.1 (1975) (amended 1976). The court stated:

> The crime of robbery as defined at common law involves a forceful taking by "violence or intimidation" but such force need not be by means of the use or threat of presenting a firearm. Robbery may be committed in many ways, such as by partial strangulation or suffocation, or by striking or beating with the fist or other less dangerous devices. . . . The "gist" of Code § 18.2-53.1 is the use of a firearm in situations where it is likely that weapons may be used to injure victims of robbery or bystanders. Under the statute, such use is made a seaparate and distinct offense. Thus, the crime of robbery and the crime of using a firearm in committing robbery have different elements as a matter of law, although they may have common elements as a matter of fact.

Id. at 315. Again, Kowalski v. Parratt, 533 F.2d 1071 (8th Cir. 1976), *cert. denied,* 429 U.S. 844 (1976), affirmed the determination of the

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consistent with the application of that test in the recent Supreme Court decision in Harris v. Oklahoma, 433 U.S. 682 (1977), *reversing,* 555 P.2d 76 (1976).

In *Harris,* the Oklahoma Court of Criminal Appeals upheld a conviction for robbery with firearms, Okla.Stat. Ann. tit. 21, § 801 (West 1958) (amended 1973), obtained in a second prosecution following a conviction for felony-murder, Okla.Stat.Ann. tit. 21, § 701 (West 1958) (repealed 1973), arising out of the same incident. The Oklahoma court reasoned that under the *Blockburger* test the felony-murder statute and the underlying felony were distinct crimes. Section 701 provided that "[h]omicide is murder . . . [w]hen perpetrated without any design to effect death by a person engaged in the commission of *any fel-*

Footnote continued

Nebraska Supreme Court in State v. Saxon, 193 Neb. 278, 226 N.W.2d 765 (1975) that felony-firearm does not include robbery (the underlying felony) as a lesser included offense. The court quoted the *Blockburger* criterion and stated:

> Although the appellant assumes that count II [felony-firearm, Neb.Rev.Stat. § 28-1011.21 (Supp. 1974)] required proof of the robbery alleged in count I [Neb.Rev.Stat. § 28-414 (Supp. 1974)] that is not the case. The weapons statute is satisfied by proof that a weapon was possessed or used during *any felony.*

Id. at 1073. (Emphasis supplied.) In United States v. Hearst, 412 F. Supp. 877 (N.D.Cal. 1976), decided prior to the Supreme Court's ruling in *Simpson* that Congress did not intend 18 U.S.C. § 924(c) to be available in prosecutions of 18 U.S.C. § 2113(d), the defendant was charged with violations of both § 2113(d) and § 924(c) arising out of a single incident. The court in *Hearst* quoted the *Blockburger* test and stated:

> This standard is satisfied by the two offenses charged here, for the reason that the first requires the use of *any* dangerous weapon in the robbery of a *bank,* whereas the second specifically requires the use of a *firearm* in the commission of *any* felony.

Id. at 879. (Emphasis in original.) The defendant was convicted and sentenced under both § 2113(d) and § 924(c), the two sentences to be served concurrently. The conviction under § 924(c) was subsequently vacated in the light of *Simpson.* United States v. Hearst, 466 F.Supp. 1068, 1072 n. 3 (N.D.Cal. 1978).

ony." (Emphasis added.) The Oklahoma Court of Criminal Appeals stated that proof of the underlying felony was required to prove the intent necessary for the felony-murder conviction, but held that "robbery is a distinct offense and is not part of the crime of homicide nor is it an included crime." 555 P.2d at 81.[6] The United States Supreme Court rejected the view that felony-murder did not include the underlying felony. "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." 433 U.S. at 682, citing In re Nielsen, 131 U.S. 176 (1889) and Brown v. Ohio, 432 U.S. 161 (1977).

The Court's conclusion that robbery with firearms is a lesser included offense of felony-murder shows how the "required proof" criterion of *Blockburger* must be applied. The crime of armed criminal action consists of two features: (1) any felony, and (2) the use of a dangerous and deadly weapon in the commission of (1). The first feature may be any one of a class of offenses, each of which consists in turn of several elements. If (1) specified a single felony, it would be obvious that armed criminal action includes all of the elements of the felony specified. For example, if § 559.225.1 said, "any person who commits *first degree robbery* by, with or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of armed criminal action," it would be obvious that armed criminal action includes first degree robbery and that the double jeopardy clause prohibits conviction and punishment for both offenses. *Harris* shows that the result is

[6]The Oklahoma court appeared ambivalent on this point. While it stated that the crime of robbery is not included in the crime of homicide, it also said that "the proof of the underlying felony is needed to prove the intent necessary for a felony murder conviction." 555 P.2d at 80-81.

no different where the statute refers to "any felony." Proof of armed criminal action still "cannot be had without" proof of the underlying offense. *Harris* stands for the proposition that when a statute defines a crime as "any felony" plus other elements, proof of the particular felony involved is required to prove that crime.[7] In the

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[7] *Cf.*, Schwartz, Multiple Punishment for the "Same Offense": Michigan Grapples with the Definitional Problem, 25 Wayne L.Rev. 825, 833 (1979):

> *Harris* simply holds that convictions for both the greater offense and the underlying offense are prohibited. Put another way: Where offense number 1 consists of elements A and B and element B consists of a class of offenses, offense number 2, offense number 3 and so on, then one may not be convicted of both offense number 1 and the offense consisting of element B in that case. Although such a result is obvious where element B consists of a single offense, *Harris* mandates the same result when element B can consist of one of several offenses. Where proof of one offense requires proof of another offense, convictions for both are barred, even though the underlying offense required to prove the former changes from case to case.

This understanding of the *Blockburger* test does not affect our holding in State v. Smith and Hodges, No. 61378 (Mo. banc, filed Dec. 6, 1979) that trespass is not a lesser included offense of burglary. In *Smith and Hodges,* we held that it is the *elements* of the greater offense and not the *allegations* of the greater offense found in the indictment or information which must be compared with the legal and factual elements of the lesser offense to determine whether one offense is a lesser included offense of another. Unlike the burglary statute involved in *Smith and Hodges,* the armed criminal action statute defines the offense as consisting of any felony plus another element. Although a court need not examine the factual averments of the greater offense in applying the *Blockburger* test, a complete list of the elements of armed criminal action cannot be generated until the underlying felony is known. A criminal statute is nothing more than a description of a certain type of conduct coupled with a provision that the state will impose sanctions (fine or imprisonment) on any person who conducts himself in the manner described. An "element" of the offense is any part of the description which must be satisfied before the state may impose sanctions. The armed criminal action statute, like Oklahoma's felony murder statute, incorporates by reference to the statutory definition of another offense ("any felony") a portion of the description of the proscribed conduct. That part of the description is supplied only by observing which other statute is involved in the particular case.

language of *Blockburger,* the armed criminal action "provision [does not] require[] proof of a fact which the [robbery first degree] statute does not." Thus, as *Harris* applies *Blockburger,* armed criminal action and the underlying felony constitutes only one offense and not two. To prove that the appellant in the instant case committed armed criminal action, the state is required to prove all of the elements of robbery first degree; if it fails to prove any element of robbery first degree, it fails to convict appellant of armed criminal action. If the state could not prove that appellant took Mr. Quick's property from the presence of its agent without the agent's consent by placing the agent in fear, it could not convict appellant of armed criminal action.[8]

After *Harris,* the application given the *Blockburger*

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[8]The two-count information filed against appellant on June 20, 1977, illustrates the fact that proof of armed criminal action cannot be had without proof of robbery first degree in this case. Count I alleged

> that on or about the 14th day of May, 1977, in the County of Jasper and State of Missouri, WILLIAM S. SOURS did wilfully, unlawfully and feloniously by means of a certain dangerous and deadly weapon, to-wit: a handgun, take, stea[l] and carry away Nine Hundred Forty-nine and 06/100 ($949.06) Dollars, lawful money of the United States of America, the money and personal property of Mr. Quick, then and there in the lawful care and custody of Kendall Carnes, by then and there putting the said Kendall Carnes in fear of an immediate injury to his person and then and there did feloniously rob, take, steal and carry away the said money and personal property from the person of, in the presence of and against the will of the said Kendall Carnes with the felonious intent to permanently deprive the owner of the use thereof and to convert the same to his own use.

Count II alleged

> that on or about the 14th day of May, 1977, in the County of Jasper and State of Missouri, WILLIAM S. SOURS did wilfully, unlawfully and feloniously commit a felony, to-wit: Robbery First Degree, by and with the use, aid and assistance of a dangerous or deadly weapon, to-wit: a handgun.

See Jeffers v. United States, 432 U.S. 137, 150 n. 16 (1977).

test in *Wayne County, Jones, Kowalski, Hearst,* and *Treadway* cannot survive.

> The argument is that . . . . armed robbery requires proof of the occurrence of a robbery, which is not *required* to prove felony-firearm, since that offense can be committed in the course of almost any felony. It is therefore contended that *Blockburger* does not bar convictions for both offenses.
>
> This argument proves too much. Applying this argument to the situation confronted by the United States Supreme Court in *Harris v. Oklahoma* would lead to a result different from that reached by the Court. After all, robbery with firearms does not require that a murder occur. Nor does felony-murder require that the offense of robbery with firearms occur. The United States Supreme Court, nonetheless, declared that convictions for both felony-murder and the underlying felony of robbery with firearms could not stand.

Schwartz, *supra* note 7, at 851.

It has been argued that the rationale of *Harris,* which involved successive prosecutions first for felony-murder and then for the underlying felony, does not apply in the context of a single proceeding involving multiple charges. The argument that *Harris* does not apply in cases in which a defendant is convicted of both crimes at the same trial has been rejected in cases that follow *Harris.* State v. Pinder, 375 S.2d 836, 838 (Fla. 1979); Tyson v. State, ____ Ind. ____, 386 N.E.2d 1185, 1193 (1979); Mitchell v. State, ____ Ind. ____, 382 N.E.2d 932, 934 (1978); Elmore v. State, ____ Ind. ____, 382 N.E.2d 893, 894-95 (1978); State v. Frye, 283 Md. 709, 393 A.2d 1372, 1375 (1978); State v. Innis, ____ R.I. ____, 391 A.2d 1158, 1165 (1978), *cert. granted,* 440 U.S. 934 (1979); State v. Briggs,

—— Tenn. ——, 573 S.W.2d 157, 159 (1978). The argument that the double jeopardy clause does not prohibit punishing a defendant for both of two crimes charged in a single prosecution where one of the crimes is an incident included in the other also contradicts the holdings in State v. Neal, 514 S.W.2d 544, 548 (Mo. banc 1974) and State v. Parsons, 513 S.W.2d 430, 438 (Mo. 1974). This argument also overlooks the fact that the case for which the "required proof" test is named, Blockburger v. United States, 284 U.S. 299 (1932), itself involved a single prosecution. "[T]he prosecution may not do in one trial what it is prohibited from doing in two trials." Elmore v. State, 382 N.E.2d at 894-95.

Cases in other jurisdictions have recognized that convicting a defendant of the use of a firearm in the commission of a felony and of the underlying felony violates the double jeopardy clause. Whitton v. State, 479 P.2d 302 (Alaska 1970); State v. Boudreau, 113 R.I. 497, 322 A.2d 626 (1974); State v. Hudson, —— Tenn. ——, 562 S.W.2d 416 (1978). In *Hudson,* the defendant was convicted in one trial of four offenses—robbery by the use of a deadly weapon, Tenn. Code Ann. § 39-3901 (Supp. 1978), assault with intent to commit murder in the second degree, Tenn. Code Ann. § 39-604 (1975), use of a firearm in committing a felony, Tenn. Code Ann. § 39-4914 (Supp. 1978), and carrying a dangerous weapon with the intent to go armed, Tenn. Code Ann. § 39-4901 (1975)—all arising out of an incident in which the defendant took more than $5,000 in cash at gunpoint from a bank's customer and shot the victim in the leg. The defendant's sentences for armed robbery and felony-firearm were ordered to run consecutively. The defendant appealed, raising the issue whether the convictions for both felony-firearm and the underlying felony violated the double jeopardy prohibition. The Tennessee Supreme Court examined the felony-firearm

provision[9] in the light of the *Blockburger* test. The Court stated:

> To give a literal interpretation to the . . . phrase ["is guilty of a felony"] results, of course, in the conclusion that this statute creates and defines a new felony that is separate and distinct from the "principal" felony which is committed by means of a firearm. But such a construction would result in a statute that could not be applied as the legislature intended without running afoul of the double jeopardy prohibitions of our state and federal constitutions. Separate convictions for the "principal" felony and the new use of a firearm felony could not stand without violating the double jeopardy clause.

____ Tenn. at ____, 562 S.W.2d at 418.[10]

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[9]Tenn. Code Ann. § 39-4914 (Supp. 1978) provided:

> Any person who employs and firearm of any character as a means of committing or escaping from a felony is guilty of a felony, and on conviction of first offense shall be punished by imprisonment in the penitentiary for not less than one (1) year nor more than five (5) years, and on conviction of second offense shall be punished by imprisonment in the penitentiary for not less than five (5) years nor more than ten (10) years. The trial judge may in his discretion suspend all or part of the penalty imposed by this section.
>
> The period of confinement imposed by this section shall be in addition to any penalty provided by law as punishment for any other felony, and shall run consecutively, and not concurrently, with any other period of confinement.

[10]The Tennessee Supreme Court accordingly concluded that the statute should be read not as creating a new felony but as amending Tennessee's other felony statutes by implication through the addition of a sentence-enhancement provision. We are prevented from similarly construing § 559.225, RSMo Supp. 1976 (§ 571.015, RSMo 1978) for two reasons. First, it is not clear that the General Assembly had as its sole purpose in passing § 559.225 merely the enhancement of penalties. The statute was clearly intended to create and define a separate crime ("is also guilty of the crime of armed criminal action") and to authorize

(Continued on next page)

In State v. Boudreau, 113 R.I. 497, 322 A.2d 626 (1974), the defendant used a .22 calibre pistol to fire a series of shots into the front of a house in which a married couple and their six sons were sleeping. The defendant was convicted of eight counts of assault with a deadly weapon and of committing a crime of violence while armed with a pistol, a violation of R.I. Gen. Laws § 11-47-3 (1970). A three-year sentence was imposed for the violent crime

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Footnote continued

two convictions of one defendant for committing a felony through the use of a dangerous and deadly weapon. The inference that the General Assembly's primary purpose was to create and define a separate crime rather than to enhance penalties for existing crimes is suggested by the fact that when the new criminal code was enacted the armed criminal action statute was placed in Chapter 571, under the title "Weapons Offenses," rather than in Chapter 558, under the title "Imprisonment". In its effort to give effect to the legislative intent to enhance punishmen for felonies committed with firearms, the Tennessee court sacrifices the legislative intent to create and define a new crime. The double jeopardy clause does not restrict the legislature's power to define crimes and fix punishments.

> [T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

Brown v. Ohio, 432 U.S. 161, 165 (1977). It is not the creation of a new crime that offends the double jeopardy guarantee; it is the provision that a defendant be convicted and punished for both the new crime and the underlying, included felony that offends.

More importantly, we are not free to construe § 559.225 as *Hudson* construed the Tennessee firearm-felony statute because amendment of statutes by implication is forbidden by Missouri's Constitution. Mo. Const. art. III, § 28 prohibits the General Assembly from amending statutes without setting forth in full the statutes so amended. State v. Valentine, 584 S.W.2d 92 (Mo. banc 1979) rejected the claim that § 559.225 violated Mo. Const. art. III, § 28 on the ground that the statute does not amend the punishment provisions of many other statutes but instead defines "an offense separate and distinct from other offenses." *Id.* at 96.

charge and made to run concurrently with a three-year sentence on one of the assault counts. "Crime of violence" was defined in R.I. Gen. Laws § 11-47-2 (1970) as including "murder, manslaughter, rape, mayhem, robbery, burglary, breaking and entering, assault with a dangerous weapon, assault or battery involving grave bodily injury, and/or assault with intent to commit any offense punishable as a felony." 113 R.I. at ____, 322 A.2d at 629. The Rhode Island Supreme Court quoted the *Blockburger* criterion for what constitutes the "same offense," and found the two crimes charged to be essentially the same: "In order to prove Boudreau guilty of the assault with a dangerous weapon, it is necessary to prove the same elements as are required to convict him on the charge of the commission of a felony with the use of a firearm." *Id.* Accordingly, the court affirmed the conviction of assault with a dangerous weapon and reversed the conviction of committing a crime of violence while armed with a pistol.

In State v. Whitton, 479 P.2d 302 (Alaska 1970), the defendant was found guilty in one proceeding of robbery, Alaska Stat. § 11.15.240 (1970), and of the use of a firearm during the commission of the robbery, a violation of Alaska Stat. 11.15.295 (1970). The Alaska Supreme Court, interpreting the double jeopardy provision in Alaska's own Constitution to prohibit multiple prison sentences for the same offense, held that the offense of robbery with firearms "already proscribes and punishes" the offense of robbery. *Id.* at 314. "The result is that the two separate statutory crimes constitute the 'same offense" for purposes of double jeopardy. A single sentence was all that could properly be imposed under the double jeopardy provision of our constitution." *Id.*

Having determined that a conviction for both robbery first degree and armed criminal action places a defendant

twice in jeopardy by multiplying the punishment for one offense, we must consider the appropriate remedy.[11]

The armed criminal action statute provides in three separate subsections for sentences of not less than three years for the first offense of armed criminal action, not less than five years for the second offense, and not less than ten years for the third. § 559.225, RSMo Supp. 1976. Each subsection contains the sentence: "The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of dangerous or deadly weapon." Our determination that the description of the offense of armed criminal action includes all of the elements of the underlying felony requires that the statute be construed as if this sentence were stricken from each subsection, since the double jeopardy clause prohibits imposing punishment for both armed criminal action and for the underlying felony.[12]

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[11]After the Supreme Court determined in Simpson v. United States, 435 U.S. 6 (1978) that Congress did not intend that both 18 U.S.C. § 924(c) and 18 U.S.C. § 2113(d) be available in a prosecution arising out of a single incident of bank robbery with firearms, four federal appellate court decisions have vacated the robbery with firearms conviction and sentence under § 924(c) where the defendant was convicted under both sections. United States v. Vaughan, 598 F.2d 336, 337 (4th Cir. 1979); United States v. Roach, 590 F.2d 181, 184 (5th Cir. 1979); United States v. Stewart, 579 F.2d 356, 359-60 (5th Cir. 1978); and United States v. Nelson, 574 F.2d 277, 283 (5th Cir. 1978).

[12]In State v. Treadway, 558 S.W.2d 646, 653 (Mo. banc 1977), this Court construed the phrase "in addition to" to permit the imposition of concurrent sentences for armed criminal action and the underlying felony, and held that the trial court must exercise its discretion whether to impose sentences consecutively or concurrently. Since we have determined in this case that the underlying felony, here robbery first degree, is a lesser included offense of armed criminal action, the determination that concurrent sentences may give effect to the legislative intent to authorize one sentence "in addition to" another does not solve the double jeopardy problem presented.

We reserve appellant's conviction and sentence for armed criminal action, and affirm appellant's conviction for robbery first degree. It is so ordered.

WARREN D. WELLIVER, Judge

Bardgett, C.J., Seiler, Morgan, Higgins, JJ., concur; Rendlen J. dissents in separate dissenting opinion filed; Donnelly, J. dissents in separate dissenting opinion filed and concurs in separate dissenting opinion of Rendlen, J.

IN THE

SUPREME COURT OF MISSOURI
EN BANC

WILLIAM SCOTT SOURS, *Appellant,* v. STATE OF MISSOURI, *Respondent.*	No. 61458

DISSENTING OPINION

The principal opinion overrules *State v. Treadway,* 558 S.W.2d 646 (Mo. 1977). In *Treadway* this Court upheld defendant's conviction under § 560.120, RSMo 1969, the then applicable first degree robbery statute, and a conviction under § 559.225, RSMo Supp. 1976, the then applicable armed criminal action statute. As stated in *Treadway* at 652 "the two offenses do not overlap." After pointing out that first degree robbery (under § 560.120) requires proof only of the taking of property by means of violence or fear whereas armed criminal action requires the proof of the use of a dangerous or deadly weapon during the commission of a felony, the Court went on to state, p. 652, "The use of a weapon is not an element of first degree robbery, although it may factually be part of the transaction." The Court then concluded, "Since the two offenses are not the same in the law appellant's double jeopardy protection has not been abrogated." Stated otherwise the crime under § 560.120 includes the statutory element of putting the victim in fear and the use of a dangerous

or deadly weapon is not a necessary part of the crime. The fear may be produced by means other than a dangerous and deadly weapon and thus a statutory element occurs under § 560.120 which is separate and distinct from and does not occur in § 559.225 (armed criminal action). On the other hand, § 559.225 necessarily contains an element, i.e., the use of a dangerous and deadly weapon not included in § 560.120 and if the underlying crime is robbery, that there be "fear induced by a dangerous and deadly weapon" and by no other means. This then is another distinguishing element of § 559.225 not present in § 560.120. In sum, each crime contains statutory elements not included in the other and by the "Blockburger test" discussed at length in the majority, the crimes are separate and distinct and a prosecution for both is not barred by double jeopardy considerations. To the extent that the majority opinion holds otherwise and overrules our decision in *Treadway* I respectfully dissent.

ALBERT L. RENDLEN, Judge

IN THE

SUPREME COURT OF MISSOURI
EN BANC

WILLIAM SCOTT SOURS, *Appellant,* vs. STATE OF MISSOURI, *Respondent.*	**No. 61458**

DISSENTING OPINION

The principal opinion treats the *Per Curiam* in Harris v. Oklahoma, 433 U.S. 682 (1977) as decisive here.

In my view, we are not bound by general declarations of law made by the United States Supreme Court. *See* State v. Clark, ____ S.W.2d ____, ____ (Mo. banc 1979) (Donnelly, J., dissenting) (No. 60221, decided December 6, 1979).

Of course, in a given factual setting, when the United States Supreme Court takes jurisdiction over the subject matter and the parties, its adjudication is the law of the case and its judgment is binding on this Court. But this is not the situation here.

I respectfully dissent.

Robert T. Donnelly, Judge

APPENDIX C

Section 560.120, RSMo 1969, reads as follows:

560.120. Robbery in first degree.—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo 1975 Supp., reads as follows:

560.135. Armed robbery, punishment for.—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

Section 559.225, RSMo 1976 Supp., reads as follows:

559.225. Armed criminal action—penalty—exceptions. —1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of

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armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in additon to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

APPENDIX D

Section 750.529, M.C.L.A., reads as follows:

750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960.

Michigan Compiled Laws Annotated, 750.227b, reads as follows:

Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a[1], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the

felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976. No. 6, § 1, Eff. Jan. 1, 1977." [Footnote omitted.]